Supreme Court, U. S.
FILED
FEB 2 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-1065

FREDERICK JUDE McINTOSH,

Appellant

vs.

ANAHEIM UNION HIGH
SCHOOL DISTRICT, et al,

Appellees

ON DIRECT APPEAL
FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
SECOND DIVISION

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO.....

FREDERICK JUDE MC INTOSH,

Appellant

vs.

ANAHEIM UNION HIGH SCHOOL DISTRICT, ANTHONY S. ORTEGA, CLIFFORD WRIGHT AND ARMIDA C. MARTIN,

Appellees

ON DIRECT APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH DISTRICT, SECOND DIVISION

JURISDICTIONAL STATEMENT

Appellant appeals from the Opinion of the Court of Appeals of the State of California, Fourth Appellate District, Division Two, entered on September 8, 1976. Appellant's Petition for a Rehearing was denied on September 30, 1976. Appellant's Appeal to the California Supreme Court was denied without a hearing on November 4, 1976. The Opinion of the Court of Appeals, Fourth Appellate District, Division 2, was not published in the California Official Reports. The Opinion and Notices are attached as Appendices 1, 2, and 3. A certified copy of the Appellant's Notice of Appeal, filed December 23, 1976, is attached hereto as Appendix 4, and Amended Notice of Appeal filed January 27, 1977 and attached as Appendix 4A.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Frederick Jude McIntosh brought suit in the Superior Court of the State of California, County of Orange, for personal injuries received on or about the 15th day of April, 1974, at 2:00 p.m. on Western Avenue near its intersection with Bridgport Street in the City of Anaheim, County of Orange, State of California. The complaint for personal injuries was filed December 24, 1974, under California Civil Code 1714. The answer to the First Cause of Action on behalf of the Defendants, Kathleen Garnet Teske, Kenneth Teske and Lois Mae Teske, who are not a party to this appeal, was filed in the Superior Court of the State of California for the County of Orange March 6, 1975. The Answer for the Anaheim Union High School District, Anthony S. Ortega and Clifford Wright was filed in the above court February 7, 1975, and the Answer on behalf of Armida C. Martin was filed April 7, 1975. The Anaheim Union High School District filed interrogatories on February 7, 1975, and served the appellant. Appellant's Answers to the Interrogatories were filed April 7, 1975, all in the Superior Court. Appellees filed a Motion for a Summary Judgment under California Code of Civil Procedure 437c on September 12, 1975, and based upon the affidavits in support of said motion, appellant filed counter affidavits and points of authorities to those issues raised by the motion. These were delivered directly to the Judge's court room October 31, 1975, marked received as of that date, and officially filed November 5, 1975. The Motion for a Summary Judgment was granted and entered November 4, 1975. Notice of Appeal was filed with the County Clerk of the Superior Court of the County of Orange on November 19, 1975.

Appellant's appeal to the Court of Appeals, of the State of California, Fourth Appellate District, Division Two, filed April 16, 1976, was based upon the fact that the trial judge raised issues not raised by the moving parties' declarations on a Motion for a Summary Judgment.

The fourth Appellate District, Division Two, in its Opinion, filed September 8, 1976, held that it was proper for the judge to raise issues and decide the issue of proximate cause without notice to the appellant.

Appellant filed a Petition for Rehearing with this court on November 23, 1976, and the Fourth Appellate District, Division Two, denied said petition on or about September 30, 1976. After said denial, but within the time the Fourth Appellate District, Division Two, still maintained jurisdiction, the Court of Appeals of the State of California, Second Appellate District, Division Three, in the case of **Beech Aircraft Corporation vs. Superior Court** attached as Appendix 5, decided on August 25, 1976, published in California Official Reports (Advanced Sheets) on September 23, 1976, pages 519 and 520, held:

> "In ruling on the sufficiency of petitioner's showing with respect to the choice of law issues which have not been rendered moot, cognizance must be taken to the changes to Code of Civil Procedure section 437c which went into effect January 1, 1974, bearing upon the showing required to establish the nonexistence of triable issues. These changes have, to some extent, liberalized the showing necessary. They have not, however, changed the following existing

rules, among others: (1) the strict evidentiary and substantive requirements for the moving declarations (Blair vs. Pitchess, 5 Cal. 3d 258, 284-285 (96 Cal. Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206); Corwin vs. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 851-852 (94 Cal.Rptr. 785, 484 P.2d 953), (2) the duty of a moving party to set forth with particularity competent evidentiary facts sufficient to establish every element necessary to a ruling in his favor, the opposing party having no obligation to file counteraffidavits to defeat the motion, unless the moving party meets this burden (Residents of Beverly Glen, Inc. vs. City of Los Angeles, 34 Cal.App.3d 117, 127 (109 Cal. Rptr. 724), (3) the liberal construction of opposing affidavits if filed (Lacy vs. Laurentide Finance Corp., 28 Cal.App.3d 251, 256 (104 Cal.Rptr. 547), and (4) the opposing party's ability to rely on his adversary's pleadings to establish facts not contained in his own affidavits (Parker vs. Twentieth Century-Fox Film Corp., 3 Cal3d 176, 181 (89 Cal.Rptr. 737, 474 P.2d 689, 44 A.L.R.3d 615). (See Zack, "The 1973 Summary Judgment Act, New Teeth for an Old Tiger," 48 Cal.State Bar J. 654.)"

A letter noting this decision was sent to Robert Gardner, Presiding Judge, Court of Appeal, State of California, Fourth Appellate District, Division 2, on October 5, 1975, attached as Appendix 6.

The appellant appealed the decision of the Fourth Appellate District, Division Two on October 18, 1976, by Petition for Hearing in the Supreme Court, State of California. The Supreme Court of the State of California denied hearing on November 6, 1976, remitted the case back on November 8, 1976, and it was filed in the Orange

County Superior Court November 10, 1976, copy of Remittitur is attached as Appendix 7. Notice of filing of Remittitur was on November 15, 1976, which is attached as Appendix 8.

After denial of a hearing by the Supreme Court of California, the Second Appellate District, Division Five, of the Court of Appeal of the State of California in the case of **Thomas A. Anderson and Betty Clouse, Plaintiffs and Appellants, vs. City of Thousand Oaks, Defendant and Respondent** 2d Civ. No. 46217, Sup. Ct. No. 55428, Opinion filed on December 20, 1976, which is attached as Appendix 9, rendered the following decision:

> "The granting of a motion for summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent's affidavits do not show such facts as may be deemed by the court sufficient to present a triable issue. (Code Civ. Proc., 437c; Stationers Corp. vs. Dun & Bradstreet, Inc., 62 Cal. 2d 412, 417.) To Prevail, therefore, the moving party's Affidavits must set forth facts establishing every element necessary to sustain a judgment in his favor before defects in counteraffidavits need be examined. (Corwin vs. Los Angeles Newspaper Service Bureau., Inc., 4 Cal.3d 842, 851.) On the other hand, it is axiomatic that counteraffidavits are construed liberally and need only set forth evidentiary facts supporting merely a possible cause of action (Orser vs. George, 252 Cal.App.2d 660, 669), since the purpose of the summary judgment procedure is to determine if issues exist to be tried, rather than to try the issues (Buffalo Arms, Inc. vs. Remler Co., 179 Cal.App.2d 700, 703)."

This Opinion has not yet been printed in the California Official Reports and is attached as Appendix 9.

The Supreme Court of the United States has jurisdiction of this appeal by virtue of 28 USC 2101(c) since the decision violates the Fourteenth Amendment. Section One of the United States Constitution.

UNITED STATES CONSTITUTION PROVISIONS INVOLVED

The Fourteenth Amendment, Section One of the United States Constitution provides as follows:

> "Nor shall any state deprive any person of life, liberty or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED BY THE APPEAL

1. Whether the Court of Appeal of the State of California, Fourth Appellate District, Division Two's decision denied the appellant equal protection under the laws.

2. Whether the Fourth Appellate District, Division Two's judgment denied the appellant due process of law.

3. Whether the California Supreme Court denied appellant due process of law when they denied a hearing.

STATEMENT OF THE CASE

The facts are that on April 15, 1974, at approximately 2:00 p.m., on Western Avenue, near its intersection with Bridgport Street, in the City of Anaheim, State of California, plaintiff's vehicle was struck by a car driven by Kathleen Garnet Teske. The plaintiff was riding his motorcycle in a lawful manner on Western Avenue when his motorcycle was struck by the Teske vehicle. This

caused the appellant to lose control of his motorcycle, veer across the street and collide with an illegally parked school bus waiting to load children at Western High School in a No Parking at Any Time Zone created by the City of Anaheim for the protection of the students of Western High School and the users of the roadway. The school bus extended at least eight feet out into the traffic lane allowing the appellant, a student at Western High School, approximately 16 feet to try to gain control of his motorcycle. The appellant was forced to lay down his motorcycle in front of him to try to avoid hitting the side of the school bus. The appellant's head struck the side of the school bus causing him to sustain a broken neck as well as other serious injuries.

Suit was filed in the Orange County Superior Court and all parties filed answers. The appellees filed a Motion for a Summary Judgment alleging that the school bus was legally parked and the appellant filed counter declarations. The Motion for a Summary Judgment was granted on the basis that there was no proximate cause, which was at no time set forth in the moving parties' declarations.

Appellant appealed to the Fourth District Court of Appeals, Division Two, of the State of California, which held that the trial judge was proper in raising the issue of proximate cause at the time of the hearing. Appellant filed a Petition for a Rehearing citing lack of notice to the appellant as well as other errors in the Court's Opinion. Said Rehearing was denied. Upon receipt of the California Official Reports (Advanced Sheets), appellant immediately raised the Federal issues by letter to Robert Gardner, Presiding Judge of the Fourth Appellate District, Division Two, citing decision of the Second

Appellate District, Division Three, regarding the **Beach Aircraft vs. Superior Court** and requested a rehearing. Said letter was unanswered and time was allowed to expire without rehearing.

Appellants appeal to the California Supreme Court setting forth the Federal issues by calling their attention to the fact that **Beech Aircraft vs. Superior Court** a written decision, was contrary to the Fourth Appellate District. Division Two's unwritten decision, as well as the fact that appellant was not given proper notice to prepare and present evidence on his behalf when the judge raised the additional issues. In said brief the court's attention was called to the fact that all Superior and Appellate Courts within the State of California would follow the rules as set forth in the written opinion, as opposed to the unwritten decision of the Fourth Appellate District, Division Two, which allowed a judge to raise issues, without notice, and decide same at the hearing, without allowing my client a fair hearing and the right to produce evidence on his own behalf. It was further noted that if appellant's appeal had been heard by the Second Appellate District, Division Three or Division 5, my client would have received judgment in his favor. Therefore, the Fourth Appellate District, Division Two violates the rule that all appellate and trial courts uniformly render decisions that are not contrary so that justice will be obtained equally by all parties in the State of California.

THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

The question involved here is whether or not the plaintiff has been denied equal protection under the law as required by the Fourteenth Amendment, Section One, of the United States Constitution.

There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. **Griffen vs. The People of the State of Illinois** (76 S. Cr. 585). Therefore, if a man must obtain equal justice regardless of the amount of money he has, he surely must have equal justice within the State when coming before the courts on all matters. You will notice that the Fourth Appellate District, Second Division's decision stated the fact that it wasn't necessary for the moving parties' papers in a Motion for a Summary Judgment to set forth all of the elements to his case before a motion should be granted in his favor and that it is fair and proper for the judge to raise the issues, if necessary. The Fourth Appellate District, Division Two's decision is not recorded and the Second District, Division Three's decision in the case of **Beach Aircraft Corp. vs. Superior Court** (61 CA3d 501) and the Second Appellate District, Division Five's decision in the case of **Thomas A. Anderson and Betty Clouse vs. City of Thousand Oaks** are recorded. The Constitutional guarantee of equal protection of the law to people implies that all litigents similarly situated may appeal to the courts for both relief and defense under like conditions with like protection without discrimination, **Old Colony Railroad Co. vs. Assessors of Boston,** (35 NE2d 246). The above opinions clearly indicate that the appellant has been denied equal protection under the law.

The next issue is whether or not the appellant has been denied due process of law. The Fourteenth Amendment construes States' power to determine process for assertion of legal rights, if reasonable notice and a fair opportunity for hearing are provided for,

Yarborough vs. North Carolina Park Commission, (145 SE 563); **Gorso vs. Bell Equipment Corps.** (376 Fed. Supp. 1027). It is the appellant's contention that when the judge was allowed to raise issues at the hearing not brought out by the moving parties' declarations, the appellant was denied reasonable notice and a fair opportunity to present his case. In this case the moving parties declarations raised the issue of the legality of the parking of the school bus and it was only necessary for the responding party to meet that issue. The judge raised the additional issue of proximate cause at the time of hearing and ruled on same. This did not give appellant reasonable notice nor a fair opportunity to prepare and present evidence at the hearing and thereby denied appellant due process of law as guaranteed by the Fourteenth Amendment, Section One of the United States Constitution.

The appellant contends that he was further denied due process of law when the California Supreme Court refused to grant a hearing. When State action or inaction offends the basic principles of fundamental fairness the defendant's right to due process of law has been violated. (**U.S. ex. rel, Ali vs. Deegan** (298 F. Supp. 398). You will notice the two different courts of Appeal ruled differently and the California Supreme Court denied a hearing, which offends the basic principle of fairness and denied appellant due process of law. The act or as here the inaction of the State violates the concept of a fair trial and does constitute a violation of a fair trial. **U.s. ex rel., Thompson vs. Dye,** (97 LED 1380).

On this appeal to the United States Supreme Court, appellant raises the issue of the propriety of a judge deciding proximate cause, one of the most difficult legal

issue to be decided in a negligence case and upon which volumes of legal opinion and case analysis have been written, without witnesses being called and cross examined by the parties at the time of trial ipso facto constitutes a denial of one's due process of law as guaranteed by the Fourteenth Amendment, Section One, of the United States Constitution. It is further the contention of the appellant that where there are two points of impact, with each defendant being negligent that the substantial factor test should be applied, since each impact caused severe injuries in and by themselves, **Urland vs. French,** 141 CA2d 278; **Deshotel vs. Atchison, Topeka & Santa Fe Railroad Co.,** 144 CA2d 224. In a recent opinion of the Court of Appeal, State of California, Second Appellate District, Division Five in **Benita Cline vs. James A. Watkins,** which is attached as Appendix 10, held:

> ". . . that proximate cause must be determined by the trier of fact."

appellant was denied the right to present evidence and witnesses, when the court granted the Motion for a Summary Judgment based upon no proximate cause and thus denied appellant due process of law.

CONCLUSION

It is respectfully requested that this case requires plenary consideration since the Court of Appeals of the State of California, Fourth Appellate District, Division Two's decision is contrarty to the decisions of the Court of Appeals of the State of California, Second Appellate District, Divisions Three and Five and the appellant was thus denied equal protection under the law as required by the Fourteenth Amendment to the Constitution, Section

One. Further, the appellant was denied due process as required by the Fourteenth Amendment to the Constitution, Section One, when the California Supreme Court refused to grant a hearing to decide this matter: when the trial court raised additional issues and decided same without reasonable notice and an opportunity to prepare and present evidence on these issues as well as deciding proximate cause without witnesses being called, cross examined and the issues presented to a jury as required by the United States Constitution.

Respectfully submitted.

ROBERT W. HARDIN
Attorney at Law

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COURT OF APPEAL, FOURTH DISTRICT
SECOND DIVISION
STATE OF CALIFORNIA

FREDERICK JUDE McINTOSH,
Plaintiff and Appellant, **4 Civil 15752**

v. **[Sup. Ct. 222749]**

KATHLEEN GARNET TESKE; ANAHEIM UNION HIGH SCHOOL DISTRICT, et al., **OPINION**
Defendants and Respondents

APPEAL from a judgment of the Superior Court of Orange County. H. Walter Steiner, Judge. Affirmed.

Robert W. Hardin for Plaintiff and Appellant.

McKay and Byrne, by Benjamin George Williams, for Defendants and Respondents.

BY THE COURT

The instant case involves the propriety of granting a summary judgment in behalf of certain defendants in this personal injury suit by plaintiff.

The facts, for the purpose of the summary judgment issue only, are that on April 15, 1974, at approximately 2:10 p.m. near the intersection of Western Avenue and Bridgeport Street in Anaheim, plaintiff's vehicle was struck by a car driven by Kathleen Teske. Plaintiff was riding his motorcycle in a lawful manner on Western Avenue when Kathleen Teske turned in front of plaintiff and struck him. The collision caused loss of control of the motorcycle which then veered off across the street to collide with a parked school bus waiting to load children at Western High School. Plaintiff's head struck the bus.

Plaintiff brought suit against Kathleen Teske, Kenneth Teske and Lois Teske. The Teskes were not parties to the motion below and are not involved in this appeal. The defendants which are parties to this appeal are the Anaheim Union High School District, Armida C. Martin (bus driver), Clifford Wright (Anaheim Union High School District Director of Transportation), and Anthony Ortega (Vice Principal of Western High School) — these defendants will hereafter be referred to collectively as the bus defendants.

The declarations on both sides in the summary judgment proceeding were poorly done. However, it is sufficiently clear that plaintiff's case against the bus defendants rests solely upon a claim that the bus was parked in a no parking zone thereby imposing liability upon the bus defendants for negligence.

The declarations were inadequate to resolve the question of whether the bus was legally or illegally parked. The inadequacy of the declarations left this as a question of fact. However, it is not a triable issue of fact.

The court below handled this case in a common sense manner. It was clear to the court under the instant facts that even if the bus was illegally parked, no liability attached to the bus defendants. The court opined that whatever parking statute was involved, its scope of intended protection could not conceivably include a motorcyclist across the street and down the block struck by another's negligence. In other words, the court believed that whatever duty arose by parking the bus in a no parking zone, it did not extend to plaintiff as a matter of law. In addition, the act of parking in the no parking zone was not a proximate cause of plaintiff's injuries.

The triable issue claimed below and on appeal is the question of whether the bus was legally or illegally parked. Plaintiff contends the court erred in going beyond that question and addressing proximate cause on its own motion. This was not error. A motion for summary judgment tests the existence of a triable issue of **material fact.** Plaintiff would have the court's inquiry restricted to the existence of a triable factual issue without regard to its materiality. Although a triable issue appears as to whether the bus was legally parked, even if it is assumed that plaintiff would prevail at trial on the question, it is readily obvious that he would not prevail in the action against the bus defendants. This is because the bus, even if illegally parked, was no a proximate cause of plaintiff's injuries. Thus, the triable issue of the legality of the bus parking does not go to a material fact.

Plaintiff, out of control, would have obviously struck something or fallen in any event. The bus was there. If the bus had not been there it would merely have been something else that added to plaintiff's injuries. The parking of the bus had nothing to do with plaintiff's accident any more than a curb would have had if plaintiff had struck it instead.

Plaintiff challenges the concept that if the bus had not been there it would merely have been something else with which he would have collided. He sees this as impermissible speculation not supported by any facts in the case. Despite this challenge, we think it but a matter of common sense that considering the out of control course of the motorcycle it was but a matter of fortuities as to what would abruptly end the helpless journey of plaintiff. It was but a stroke of legal luck that the

obstruction encountered may have been illegally parked. If the bus had been legally parked there could be no issue in this case. It is not the fact of illegal parking that caused plaintiff's injuries, it is the fact that he had been sent on a careening journey which could only be ended by impact with the ground or collision with an object.

The parked bus is no different than if plaintiff had careened into a nonconforming wall, a truant child, an anxious jaywalker, an overweight streetwalker, or an illegally grazing elephant. Whatever was in his path was to be struck. The distinction between the legality and illegality would seem to be of no moment.

If we do as the trial court did and assume the bus was illegally parked, no triable issue of fact remains. The facts therebecome undisputed and the existence of proximate cause a question of law. (**Arthur v. Santa Monica Dairy Co.,** 183 Cal. App. 2d 483, 486.)

In **Arthur** a milk truck was illegally double parked in the slow lane and the driver away from the vehicle. The car in which Arthur was a passenger collided with the rear of the truck. The auto driver (John) did not see the illegally parked truck ahead of him as at the time he was searching for a lighted cigarette which had been dropped on the floor.

The **Arthur** court found that the negligent conduct of the auto driver constituted an intervening act which broke the chain of causation and constituted the proximate cause of the accident. "We do not here have the simple case of direct causation, but one in which an independent force, consisting of the negligent conduct of the driver of the Chevrolet, intervened. Appellant contends, however, that had defendants' truck not been illegally parked the

collision would not have occurred, thus the double parked milk truck was the proximate cause of the accident. It would indeed be nonsense to say that had the truck not been there the Chevrolet would still have run into its rear; but it is not nonsense to suggest that had defendants' parking not been in violation of the law the Chevrolet would still have collided with it. The evidence clearly shows that John would have run into anything at that location, legally or illegally parked. '[I]f the accident would have happened anyway, whether defendant was negligent or not, then his negligence was not a cause in fact and, of course, cannot be the legal or responsible cause'." (At p. 487.) "Appellant's position that defendants original negligence was continuing negligence right up to the time of the collision, thus constituting proximate cause, is not well taken. Cases too numerous to mention have well established that an original act of negligence is not a proximate cause of injury when the injury directly results from the intervening act of another, which is an act not to be reasonably anticipated by the first party as reasonably likely to occur and follow through from his own act." (At p. 488.)

The **Arthur** court discussed **McMillan v. Thompson,** 140 Cal. App. 437, in which a truck driver (Zimmer) had mechanical problems with his truck while driving on a two lane road. Instead of moving off onto the dirt shoulder, Zimmer left his truck on the roadway and commenced repairs. McMillan's vehicle approached the truck from the rear and seeing it, commenced to pass. As McMillan pulled out to pass he was struck in the rear by another car driven by Deaver. Deaver's car caused McMillan to strike Zimmer's truck. McMillan's passenger died and in a wrongful death action both Zimmer and Deaver were sued.

After earlier observing that Zimmer's negligence in stopping the truck, if any, was not the proximate cause of the death of McMillan's passenger, the court said: "If it be assumed that the driver of the truck and trailer was negligent in stopping where he did, we think it must be held, under the established rules, that this act upon his part was not a proximate cause of the accident here in question. Had the truck and trailer been moving at the time, the appellants would not have been negligent, but the general situation, so far as the negligence of Deaver is concerned, would have been the same. The stalled truck was plainly visible, with its lights burning, and the left half of the highway was entirely clear, as testified to by the driver of the light truck which was about to pass. Under such conditions, while the driver of the stalled truck must have known that other vehicles would be apt to pass, it would be unreasonable to expect him to also anticipate that, while another car was passing, a third car would come up from behind and crash into the passing car. While a sudden stop frequently causes a collision with a car approaching from the rear, it is not ordinarily to be expected that drivers of automobiles will run head-on into cars ahead of them which are in plain sight and have been long stopped. Much less is it to be expected that a driver will cross to the left half of a highway when the was is not clear, and then crash into a car ahead which is not stopped, but is moving in the same direction as himself. That the defendant Deaver should cross over to the left side of the road and then crash into a car directly in front of him is a circumstance hardly to have been expected whether the truck and trailer were stopped or moving. In our opinion, the injury here resulted no only from one

the intervening act of a third party, but from one which was not reasonably to have been anticipated by the driver of the stalled truck as likely to occur and follow through and as the result of his own act." (At pp. 441-442.)

Plaintiff's position is that if the bus had not been illegally parked it would not have been in his path and he therefore would not have been injured by colliding with it. As in **Arthur** and **McMillan,** here the manner of the injury was not reasonably foreseeable to the bus defendants and the location of the bus not an act of negligence proximately causing the injury. The tril court judgment must be upheld.

Judgment affirmed.

COURT OF APPEAL — FOURTH DIST.
FILED
SEP 8 - 1976
ERVIN J. TUSZYNSKY, Clerk

NOT TO BE PUBLISHED IN OFFICIAL RECORDS

COURT OF APPEAL — STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

4 Civ. NO. 15752
COUNTY NO. 222749

FREDERICK JUDE McINTOSH

FREDERICK JUDE McINTOSH*

Appellant

vs.

ANAHEIM UNION HIGH SCHOOL DISTRICT, et al

Respondents

BY THE COURT:

The petition for rehearing is DENIED.

GARDNER, P.J.

COURT OF APPEAL — FOURTH DIST.
FILED
SEP 30 1976
ERVIN J. TUSZYNSKI, Clerk

Appendix No. 2

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

NOV 4 — 1976 I have this day filed Order HEARING DENIED In re: 4 Civ. No. 15752 McIntosh vs. Anaheim Union High Sch. Dist.

Respectfully,

G. E. BISHEL, Clerk

Appendix No. 3

COURT OF APPEALS OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

FREDRICK JUDE McINTOSH,

Plaintiff-Appellant

vs.

ANAHEIM UNION HIGH SCHOOL DISTRICT,

Defendants-Appellees

4TH CIVIL NO. 15752
NOTICE OF APPEAL
[Filed December 23, 1976]

Notice is hereby given that the Appellant, FREDRICK JUDE McINTOSH, hereby appeals to the Supreme Court of the United States from the entire judgment of the Court of Appeals of the State of California, 4th District, 2nd Division, dated September 8, 1976; Petition for Rehearing, dated September 30, 1976; and the California Supreme Court's Denial of Hearing on November 4, 1976, and said denial holds the trial judge had a right to decide issues not raised by the moving parties' pleadings on a Motion for a Summary Judgment, which conflicts with the Court of Appeals of the State of California, Second Appellate District, Division 3, which has held that the

Appendix No. 4

moving parties' pleadings must establish every requirement sufficient to establish every element to a ruling in his favor on Motion for a Summary Judgment. The Fourt Appellate District, Division 2's, decision in the instant action is not printed, while the Second Appellate District, Division 3's, decision is printed. This appeal is taken pursuant to 28 U.S.C. 210(c) since the decision violates the 14th Amendment, Section 1, of the United States Constitution.

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COURT OF APPEAL — FOURTH DIST.
FILED
DEC 23 1976
ERVIN J. TUSZYNSKI, Clerk

COURT OF APPEALS OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

FREDERICK JUDE McINTOSH,
Plaintiff-Appellant

vs.

ANAHEIM UNION HIGH SCHOOL DISTRICT, et al.,
Defendants-Appellees

4TH CIVIL NO. 15752
FIRST AMENDED NOTICE OF APPEAL
[Filed January, 1977]

Notice is hereby given that the Appellant, FREDERICK JUDE McINTOSH, hereby appeals to the Supreme Court of the United States from the entire judgment of the Court of Appeals of the State of California, Fourth Appellate District, Division Two, dated September 8, 1976; Petition for Rehearing, dated September 30, 1976, and the California Supreme Court's Denial of Hearing on November 4, 1976, and said denial holds the trial judge had a right to decide issues not raised by the moving parties' pleadings on a Motion for Summary Judgment, which conflicts with the Court of

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Appeals of the State of California, Second Appellate District, Divisions Three and Five, which have held that the moving parties' pleadings must establish every requirement sufficient to establish every element to a ruling in his favor on Motion for a Summary Judgment, as well as the propriety of the trial judge ruling on the issue of proximate cause without a jury trial. The Fourth Appellate District, Division Two's decision in the instant action is not printed, while the Second Appellate District, Division Three and Five's decision are printed. This appeal is taken pursuant to 28 U.S.C. 210:c;, since the decision violates the 14th Amendment, Section One, of the United States Constitution by denying equal protection of the law and due process of law.

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COURT OF APPEAL — FOURTH DIST.
FILED
JAN 27, 1977
ERVIN J. TUSZYNSKY, Clerk

[Civ. No. 47558. Second Dist., Div. Three. Aug. 25, 1976.]

BEECH AIRCRAFT CORPORATION, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
KATHERINE MARIE AANESTAD, as Administratrix, etc., et al.,
Real Parties in Interest.

SUMMARY

After an aircraft accident in New Mexico allegedly due to defective design of the aircraft and a defective baggage department latch made by a California manufacturer, and giving rise, in California, to wrongful death actions against the aircraft manufacturer and others, the aircraft manufacturer sought a writ of mandate in the Court of Appeal compelling the superior court to grant its motion for summary judgment declaring New Mexico law to be the applicable law in determining the rights and liabilities of the parties, and that under New Mexico law wrongful death damages arising out of the death of a passenger on a public conveyance may only be recovered from the common carrier that owned the conveyance. In a minute order citing a Supreme Court case, the superior court had denied the motion without further comment. The consolidated actions, at that time, involved not only the wrongful death issues and the issue of strict liability, but also issues of indemnity as reflected in cross-complaints by and against several of the parties. The Court of Appeal denied the petition for the writ, noting that no decision on choice of law could be inferred from the superior court's order, and holding that though choice of law is a proper subject for summary judgment and should be determined independently as to each issue in the case, the choice of law issue on the wrongful death claim in the instant case was moot, because a recent decision by the New Mexico Supreme Court showed that the substantive law thereon was the same as in California. The Court of Appeal further held that the aircraft manufacturer had not made the proper motion or showing necessary to require the superior court to determine the choice of law on the other issues of strict liability, indemnity, and contribution, and that such

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insufficiency was not cured by plaintiffs' failure to file any counter-affidavits thereon. For the guidance of the superior court in further proceedings on the choice of law questions, the Court of Appeal outlined the facts and policies to be weighed. (Opinion by Potter, J., with Ford, P. J., and Allport, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Conflict of Laws § 6—Torts—Order Denying Motion for Summary Judgment—Interpretation.**—In wrongful death actions against an aircraft manufacturer and others, arising out of an aircraft accident in New Mexico and requiring choice-of-law determinations on issues of wrongful death, products liability, indemnity, and contribution, the fact that the superior court cited a California Supreme Court case in denying, by minute order, the aircraft manufacturer's motion for summary judgment (based on the applicability of New Mexico law under which plaintiffs allegedly stated no cause of action for wrongful death under the particular circumstances) did not imply an adjudication that California law governed the actions, where the cited case merely held that the "governmental interest approach" determined choice of law; where, furthermore, the superior court, in its order, made no affirmative declaration of a California choice of law; and where, in any event, the factual issues of the circumstances under which, at the time of the order, New Mexico law would allegedly not have sustained a wrongful death action had yet to be determined.

(2) **Summary Judgment § 4—Propriety—As Determined by Character of Action—Summary Determination of Choice of Law.**—A determination of choice of law is a proper subject for summary judgment under Code Civ. Proc., § 457c, and such a determination must be made where there is no triable issue as to any material fact determinative of the choice of law, regardless of whether the determination is dispositive of the entire cause of action; when the determination is not entirely dispositive, the action then proceeds to trial as to the issues remaining.

(3) **Summary Judgment § 29—Mandamus—Summary Determination of Choice of Law.** When, by summary judgment, there is a determination of choice of law that is not dispositive of the entire cause of action, such determination is not appealable, but is subject to review by writ of mandate upon an appropriate showing of the need therefor, as is an entirely dispositive summary determination of choice of law that under the circumstances is not appealable.

(4) **Courts § 13—Jurisdiction—Moot Questions—Choice of Law—Decision Holding Laws of Both States Identical.**—In wrongful death actions against an aircraft manufacturer arising out of an aircraft accident in New Mexico, in which action the manufacturer sought, and was denied, a summary judgment to apply New Mexico law, which, arguably, unlike California law, would not sustain a wrongful death cause of action under the particular circumstances, such choice-of-law issue, on the manufacturer's subsequent attempt by writ of mandate from the Court of Appeal to compel the superior court to grant the motion for summary judgment, had become moot where, in the interim, the New Mexico Supreme Court had decided that, under the circumstances stated, a wrongful death action would lie under New Mexico law.

(5) **Conflict of Laws § 6—Torts—Choice of Law—Analysis as to Each Issue of Case.**—California's use of the governmental interest approach to a determination of choice of law requires an analysis of the respective interests of the states involved, the objective of which is to determine the law that most appropriately applies to the issue involved. Thus, in wrongful death actions against an aircraft manufacturer and others arising out of an aircraft accident in New Mexico and, additionally, involving issues of products liability substantive law, indemnity, and contribution between defendants, the determination of choice of law required a separate analysis with respect to each of the additional issues, regardless of the fact that the choice of law issue on wrongful death had become moot.

(6) **Summary Judgment § 3—Propriety—Showing of Nonexistence of Triable Issues.**—Though, with respect to summary judgments, the required showing of the nonexistence of triable issues was to a certain extent liberalized by the amendments, effective 1974, to Code Civ. Proc., § 437c, such amendments did not change the existing rules relating to strict evidentiary and substantive requirements for the moving declarations, or the duty of a moving party to

set forth with particularity competent evidentiary facts sufficient to establish every element necessary to a ruling in his favor, the opposing party having no obligation to file counter-affidavits to defeat the motion unless the moving party meets this burden. Neither did it change the rule of liberal construction of opposing affidavits if filed, or that regarding the opposing party's ability to rely on his adversary's pleadings to establish facts not contained in his own affidavits.

(7a, 7b) **Summary Judgment § 12—Affidavits—Sufficiency—Choice of Law—Wrongful Death Actions and Associated Issues.**—In wrongful death actions against an aircraft manufacturer and others arising out of an aircraft accident in New Mexico and, additionally, involving issues of products liability substantive law, indemnity, and contribution between defendants, the aircraft manufacturer did not make the proper motion or showing necessary to require the superior court, on motion for summary judgment, to determine the choice of law on such additional issues, and such insufficiency was not cured by plaintiffs' failure to file any counter-affidavits, where the sole reference in the moving papers to any but the wrongful death issue, as stated in the aircraft manufacturer's reply to plaintiffs' opposition to the motion, was that "New Mexico has a predominant interest in applying its product liability law (and its indemnity law) to defendant who has sold a product in New Mexico to a New Mexico defendant," and where such statement was factually incorrect and unsupported by the affidavits or by cited authority.

(8) **Summary Judgment § 15—Counter-affidavits—Failure to File—Effect.**—When no affidavits are filed in opposition to affidavits in support of a motion for summary judgment, the court is entitled to accept as true the facts alleged in the movant's affidavits if such are within the affiant's personal knowledge and are ones to which he could competently testify.

(9) **Conflict of Laws § 1—Choice of Law—Nature of Court's Selection.**—Where the forum court undertakes to resolve a choice-of-law problem presented by the litigants, it does not choose between foreign law and its own law, but selects the appropriate rule of decision for the forum to apply as its law to the case before the court.

(10) **Conflict of Laws § 1—Choice of Law—Party's Burden as to Foreign Law.**—Generally, the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event, he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one to apply to the case.

(11a, 11b) **Conflict of Laws § 6—Torts—Party's Burden as to Foreign Law.**—In wrongful death actions against an aircraft manufacturer and others arising out of an aircraft accident in New Mexico allegedly due to a defective latch manufactured by a California defendant, and involving issues of products liability substantive law, indemnity, and contribution between defendants, California law would be applicable to such issues in the absence of a strong showing that New Mexico law would further the interest of the foreign state and that it would be the appropriate law for the forum to apply.

(12) **Conflict of Laws § 1—Choice of Law—States' Interests.**—In a civil case in which, with respect to the resolution of a particular issue, it is shown that a foreign state has an interest that would be furthered by application of its own law, a "true conflict" may arise as to which state's law should be applied by the forum, and in such case the forum must determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state.

[See **Cal.Jur.3d**, Conflict of Laws, § 19; **Am.Jur.2d**, Conflict of Laws, §§ 11, 73.]

(13) **Products Liability § 39—Strict Liability in Tort—Elements; Pleading—Defect Unreasonably Dangerous.**—With respect to strict liability, public policy in California demands that responsibility be fixed whenever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. Thus, in a strict liability case, there is no requirement that the defect leading to the injury be unreasonably dangerous; such requirement would burden the injured party with proof of an element that rings of negligence.

(14) **Conflict of Laws § 6—Torts—Choice of Law—As Affected by "Inconsequential Defendant."**—In wrongful death actions against

an aircraft manufacturer and others arising out of an aircraft accident in New Mexico allegedly due to a defective latch manufactured by a California defendant, and involving issues of products liability substantive law, indemnity, and contribution between defendants, the court, in determining the choice of law on such issues, could not treat the California latch manufacturer as an "inconsequential defendant," where the cause of action against it was based on strict liability (for which under California, but not New Mexico, law, no finding would be necessary that the defective latch was unreasonably dangerous); where, furthermore, such manufacturer had been actively involved in the initial litigation, having succeeded in changing the venue and demurring to a cause of action seeking punitive damages (not recoverable in California in a wrongful death action); and where the manufacturer was involved in the indemnity issue, which was the basis not only of a cross-complaint against it by the aircraft manufacturer but also of its own cross-complaint against the corporate owner of the aircraft and against the plaintiff administering the estate of the deceased pilot.

COUNSEL

Gibson, Dunn & Crutcher, Sherman S. Welpton, Jr., Robert Forgnone and Dale F. Kinsella for Petitioner.

No appearance for Respondent.

Magana & Cathcart, Brian R. Magana, Kern & Wooley, James I. Michaelis, Kirtland & Packard and E. A. Tharpe III for Real Parties in Interest.

OPINION

POTTER, J.—Petitioner Beech Aircraft Corporation (hereinafter "Beech") seeks a writ of mandate compelling the superior court to grant its motion for summary judgment in three consolidated cases wherein Beech sought orders declaring (1) New Mexico law "the applicable law

in determining the rights and liabilities of the parties," and (2) that under New Mexico law wrongful death damages "arising out of the death of a passenger on a public conveyance may only be recovered from the common carrier which owned the conveyance."

Statement of the Case[1]

The parties to the consolidated cases involved in this proceeding are Beech, the producer and manufacturer of a certain Beechcraft Queenair Aircraft; Adams-Rite Manufacturing Company (hereinafter "Adams-Rite"), the designer and manufacturer of a door latching mechanism used in the Queenair Aircraft; Ross Aviation, Inc. (hereinafter "Ross"), the owner and operator of the particular Queenair Aircraft,[2] Katherine Marie Aanestad, the administratrix of the estate of Bruce Arthur Bean (hereinafter "Aanestad/Bean"), a passenger killed when the Beechcraft plane crashed, and Janet Eugenio Clark, the administratrix of the estate of Richard T. Zettel, the pilot of the plane also killed in the crash (hereinafter "Clark/Zettel").

The aircraft crashed on May 19, 1972, near the Albuquerque International Airport in Albuquerque, New Mexico, killing the pilot, Zettel, and all 8 passengers, including Bean. The alleged cause of the crash was the defective design of the aircraft and the defective door latching mechanism. The nose baggage compartment door is so located that, when opened, it intersects the arc of the aircraft's left propeller. Though there was some dispute as to whether the door was latched prior to take-off (real parties in interest contend the door was latched while petitioner contends the contrary), all parties agree that when airborne the door opened, striking the propeller, whereupon the plane "stalled, spun and crashed."

Both administratrixes are residents of California, while decedents Bean and Zettel were residents of New Mexico. Ross is a Delaware corporation with its principal place of business either in Albuquerque, New Mexico, according to petitioner, or Tulsa, Oklahoma, according to real parties in interest. Ross does substantial business in New Mexico.

[1]Pursuant to rule 12(a) of the California Rules of Court, this court has caused the original superior court files in these proceedings to be transmitted to this court and made a part of the record on appeal.

[2]Ross acquired the plane from Air South, an air taxi operation. Air South's place of incorporation and principal place of business does not appear in the record provided by Beech.

Beech is a Delaware corporation with its principal place of business in Wichita, Kansas. Beech contends it does little or no business in California. Real parties in interest contend Beech does "substantial business" in California.[3] Adams-Rite is a California corporation with its principal place of business in Glendale, California.

Lawsuits resulting from the above accident include the Aanestad/Bean and Clark/Zettel wrongful death actions originally filed in the Superior Court of Orange County, and the actions of the remaining passengers for wrongful death filed in the United States District Court for New Mexico, under the heading *Langham* v. *Beech Aircraft Corporation*, No. 74-CIV.[4]

The Aanestad/Bean and Clark/Zettel actions were filed December 8, 1972, and February 15, 1973, respectively; in each of them the defendants named were Beech Aircraft Corporation, the Hartwell Corporation,[5] and 10 Does. Adams-Rite was later served as Doe I. Liability was based upon negligence, breach of warranty, and strict liability in tort.

On April 10, 1973, Beech moved to dismiss the Aanestad/Bean action upon grounds of lack of jurisdiction or, in the alternative, forum non conveniens.[6] This motion was denied upon the grounds that Beech's

[3]This statement is "supported" by the April 6, 1973, affidavit of J. A. Elliott, a vice president, treasurer and director of Beech Aircraft Corporation, made in support of Beech's motion to dismiss for lack of jurisdiction or forum non conveniens. In the affidavit, Elliott stated that Beech Aircraft Corporation owns all the outstanding shares of Beech Holdings, Inc., a Kansas corporation, with its principal place of business in Wichita, Kansas. Beech Holdings owns all the outstanding stock of Beechcraft West, a California corporation, located in Van Nuys, California. Beechcraft West owns all the outstanding shares of stock of Mission Beechcraft, Inc., a California corporation, with its principal place of business at Santa Ana, California. Beech Aircraft Corporation does not sell the aircraft it manufactures in California; rather all orders from dealers and distributors for aircraft are accepted by Beech Aircraft at its principal place of business at Wichita, Kansas, and title to all aircraft is transferred in Kansas.

Real Parties in Interest also contend, without dispute, that Beech advertises in California.

[4]Another action is *Bean* v. *Ross Aviation, Inc.*, No. 75-322 CIV, wherein the Bean wrongful death claimants proceeded separately against Ross in the United States District Court for New Mexico.

[5]The superior court files do not indicate any appearance by Hartwell Corporation as a defendant. No party mentions Hartwell in its brief; accordingly, we will assume for the purpose of this proceeding that Hartwell is not a party to these actions.

[6]In general, Beech's motions with respect to the Aanestad/Bean action were the same as its motions in the Clark/Zettel action. Except as otherwise indicated, the substance of Beech's motions will be treated as applying to both plaintiffs' actions.

counsel had previously filed a general demurrer to the complaint, thus submitting Beech to the jurisdiction of the court. On April 19, 1973, counsel stipulated that an attempted removal of the actions to the federal court was improper since no complete diversity existed. Subsequently, both Beech and Adams-Rite filed demurrers to the "purported fourth cause of action" of the Clark/Zettel complaint, which sought punitive damages, upon the ground that "Under California Law, Punitive Damages May Not Be Recovered in an Action for Wrongful Death." Beech's demurrer was filed May 17, 1973. Thereafter, on June 1, 1973, this demurrer was placed off calendar due to the court's granting of Adams-Rite's motion to change venue to Los Angeles County.

On February 27, 1973, the Orange County Superior Court sustained Beech's general demurrer to the "purported Fourth Cause of Action" in the Aanestad/Bean complaint. Aanestad/Bean subsequently amended its complaint and Beech again demurred to the cause of action seeking punitive damages. In the meantime, the case was transferred to the Los Angeles court. On October 19, 1973, the Los Angeles Superior Court sustained the demurrer to the Aanestad/Bean first amended complaint, stating "California will not permit a greater recovery than is allowed by its own statutory framework." Thereupon, counsel stipulated that such ruling would apply equally to the Clark/Zettel litigation. On November 27, 1973, Beech answered the Clark/Zettel complaint, alleging contributory negligence on the part of Zettel.

On January 3, 1974, Adams-Rite answered the Clark/Zettel complaint and simultaneously filed a cross-complaint for indemnity and declaratory relief against Ross and Clark/Zettel. On March 1, 1974, Ross filed a demurrer to this cross-complaint, asserting that under either California or New Mexico law, no right of indemnity existed. On March 27, 1974, this demurrer was overruled. On May 7, 1974, Ross's motion to reconsider this ruling was denied. Thereafter, Ross filed a complaint for property damage and indemnity against Beech. On June 13, 1974, Beech countered this, filing a cross-complaint in the Ross action for indemnity against Clark/Zettel, Ross, and Adams-Rite. Ross's motion to consolidate the Clark/Zettel, Aanestad/Bean and Ross actions was granted on July 11, 1975. On October 1, 1975, Ross's demurrer to the Beech cross-complaint was sustained, the court holding that California law provided no such indemnity. In addition, a motion by Ross for judgment on the pleadings as to the Adams-Rite cross-complaint was granted with leave to amend. On November 25, 1975, Ross and Clark/Zettel's

demurrers to Adams-Rite's first amended cross-complaint were sustained without leave to amend, and a formal order of dismissal was subsequently filed on December 12, 1975.

Prior to this, on September 19, 1975, Beech moved the court for an "order of dismissal, stay or conditional dismissal on grounds of inconvenient forum, alternative motion to stay action." This motion was based upon developments arising in the *Langham* actions filed in the United States District Court for New Mexico. The sole defendant in the *Langham* action at the time of these developments was Beech.[7]

Beech had moved for judgment on the pleadings in the United States District Court for New Mexico in the *Langham* action. Beech contended that "New Mexico law . . . while providing a remedy for wrongful death to a passenger against the common carrier (Ross), *arguably made that remedy the exclusive remedy.*" The United States District Court determined this to be a correct statement of New Mexico law but ruled that the question of Ross's common carrier status was one of fact; hence, should Ross be found to be a contract carrier, an action for wrongful death would lie against Beech. After conducting a "mini-trial" upon such question, the court, dismissing the jury, determined that Ross was a "contract" carrier, and denied Beech's motion.

Nevertheless, finding the matter subject to "difference of opinion," the court certified it for interlocutory appeal to the United States Court of Appeals for the Tenth Circuit, pursuant to 28 United States Code section 1292(b). Thereafter, in August 1975, the Tenth Circuit ruled that Ross was not a contract carrier. However, the Circuit Court also determined that the issue whether the New Mexico wrongful death statute provided a remedy exclusively against the common carrier presented questions of New Mexico public policy subject to no controlling precedents. The court, pursuant to a New Mexico statute, certified the question to be answered by the New Mexico Supreme Court which accepted such certification.

Based on the above state of facts, Beech sought (1) a stay of the California actions pending resolution of the issue by the New Mexico Supreme Court, or (2) in the alternative, a dismissal, claiming forum non conveniens.[8]

[7]Ross settled prior to such developments, while Adams-Rite had not been made a defendant at the time of such developments.

[8]No attempt will be made herein to deal with the merits of Beech's motion to dismiss based on forum non conveniens.

On September 29, 1975, real parties in interest filed their opposition to Beech's motions. Basically, they asserted that no plaintiff was a party to the New Mexico action; therefore, they could not be bound by the New Mexico ruling. Moreover, any dismissal would result in extreme prejudice since the statute of limitations had run on any new action by plaintiffs. Further, no dismissal was warranted since the court could, if need be, apply New Mexico law. Beech's motions were denied on September 30, 1975.

On October 3, 1975, Beech filed the instant motion for summary judgment. This motion sought to force the court to declare New Mexico law "the applicable law in determining the rights and liabilities of the parties," and to hold that New Mexico law provides that "damages for wrongful death arising out of the death of a passenger on a public conveyance may only be recovered from the common carrier which owned the conveyance." Said motion was based upon the "Declarations, Affidavits and Exhibits" and "all the papers, pleadings and files of the court in this and recently consolidated actions."

On October 23, 1975, real parties in interest Aanestad/Bean filed their opposition to the motion. No affidavits were filed in opposition, the parties relying on the affidavits and exhibits previously filed with the court. The factual issues, previously stated, were the contentions that Ross's principal place of business was in Oklahoma and that Beech did substantial business in California, including the advertisement of the Queenair model aircraft to California citizens. Summary judgment was opposed on the grounds that (1) California law should govern the action, (2) should New Mexico law apply, the court would still need to decide whether Ross was a common carrier, the factual determinations of the New Mexico courts not being binding, and (3) should New Mexico law apply, such that a wrongful death action is precluded, such law should not be enforced since it violates both the California public policy encouraging manufacturer strict liability and the Fourteenth Amendment to the United States Constitution.

On October 28, 1975, a hearing was held on the motion. Basically, the parties, relying on the papers filed, addressed the choice of law issue as it bore upon the existence of a wrongful death cause of action against Beech. Some discussion was directed to whether New Mexico's law regarding indemnity would apply insofar as Adams-Rite was a party, with counsel for Ross asserting that such issue was not adequately

briefed in the motion for summary judgment.[9] Counsel for Beech concurred in this evaluation of the motion.[10]

On November 7, 1975, the court, by minute order, denied the motion for summary judgment, citing *Hurtado* v. *Superior Court*, 11 Cal.3d 574 [114 Cal.Rptr. 106, 522 P.2d 666].

Beech's petition for writ of mandate, seeking to compel the court to designate New Mexico law applicable to the consolidated cases, was filed November 26, 1975. On November 18, 1975, in *Langham* v. *Beech Aircraft Corporation*, 88 N.M. 516 [543 P.2d 484, 489], the New Mexico Supreme Court had announced its ruling on the certified question, finding that: "The manufacturer of a 'public conveyance' can be held liable for damages where the passengers died as a result of defects in the conveyance, and the remedy provided . . . against the 'owner' of a defective 'public conveyance' does not provide the only remedy."

Therefore, under either New Mexico or California law a cause of action for wrongful death existed against Beech. On December 23, 1975, this court denied petitioner's writ of mandate.

Petitioner thereupon filed a petition for hearing in the California Supreme Court, stating that it was "unmistakenly clear" that the lower court's November 7, 1975 order applied California law (due to the *Hurtado* citation), and that "an intolerable trial situation" exists "in that none of the parties in any of the actions know what law will govern." On February 11, 1976, the petition for hearing was granted. Thereafter, on April 23, 1976, the Supreme Court ordered the proceeding transferred back to this court "with directions to issue an alternative writ of mandamus to be heard before that court when the proceeding is ordered on calendar. (See *Bernhard* v. *Harrah's Club* (1976) 16 Cal.3d 313 [128

[9]Counsel for Ross stated to the court:

"I believe if the court is influenced by the indemnification, that we would like some opportunity to indicate to the court that that really isn't clear in New Mexico.

"I am not so sure we have a clear right for indemnification if the New Mexico law applies.

"We haven't looked at it from that standpoint.

"The motion for summary judgment wasn't directed to us, necessarily, on the indemnification. So I think that point should be looked into.

"And I am not so sure that it is clear that we have a right for indemnification."

[10]Counsel for Beech stated to the court:

"To be honest with you, I would rather not get bogged down into what the potential rights of these plaintiffs might be in indemnity, and in the area of contribution.

"The issue before this court now is, who has the preponderate interest in applying their wrongful death statute to these various defendants."

Cal.Rptr. 215, 546 P.2d 719])." On April 30, 1976, this court, following the order of the Supreme Court, issued the alternative writ of mandate.

Issues

Petitioner requests this court to find, under established California choice of law principles, that the lower court's "application" of California law constituted an abuse of discretion, and that the court should declare New Mexico law applicable to these proceedings. Real parties in interest contend that the lower court made no finding on the choice of law applicable, that it would be premature for such decision to be made "because evidence will have to be introduced prior to the determination of choice of law," and that California's law should govern determination of the issues presented in this litigation.

Discussion

No Decision on the Choice of Law Applicable Can Be Inferred from the Trial Court's Ruling

(1) Beech contends that the court's November 7, 1975 ruling denying summary judgment was in fact an adjudication that California law governed this action.

We disagree. Certainly, either New Mexico or California law justified the court's refusal to enter summary judgment in favor of Beech on the wrongful death cause of action. Under New Mexico law, even before the November 18, 1975 ruling of the New Mexico Supreme Court, the factual issue of contract versus common carrier remained to be determined, as well as issues going to the constitutionality of denying a cause of action against manufacturers of equipment used by common carriers. The citation of *Hurtado* v. *Superior Court*, 11 Cal.3d 574 [114 Cal.Rptr. 106, 522 P.2d 666], is not decisive since *Hurtado* merely holds that a "governmental interest approach" determines choice of law, and does not thereby establish the trial court's use of California law in denying the motion. Further supporting this view is the trial court's failure to affirmatively declare California law controlling. Accordingly, we find the court's denial of Beech's motion not to constitute an adjudication that California law applied to this action.

Choice of Law Is a Proper Subject for Summary Judgment When a Sufficient Showing Is Made

Petitioner next contends that no triable issue of fact exists as to choice of law; hence the denial of the motion for summary judgment is an error in law, thereby "automatically" constituting an abuse of discretion. (See *Whitney's at the Beach* v. *Superior Court*, 3 Cal.App.3d 258 [83 Cal.Rptr. 237]; *Roman Catholic Archbishop* v. *Superior Court*, 15 Cal.App.3d 405 [93 Cal.Rptr. 338].) (2) In contrast, real parties in interest contend that such a determination of choice of law is an improper subject for summary judgment. The statutory language is not explicit in this respect; a review of the legislative history of present section 437c, Code of Civil Procedure,[11] is, therefore, necessary.

Former section 437c[12] of the Code of Civil Procedure, governing the summary judgment proceedings, read in pertinent part as follows: "If it appears that such defense applies only to a part of the plaintiff's claim, or that a good cause of action does not exist as to a part of the plaintiff's claim, or that any part of a claim is admitted or any part of a defense is conceded, the court shall, by order, so declare, and the claim or defense shall be deemed established as to so much thereof as is by such order declared and the cause of action may be severed accordingly, and the action may proceed as to the issues remaining between the parties. No judgment shall be entered prior to the termination of such action but the judgment in such action shall, in addition to any matters determined in such action, award judgment as established by the proceedings herein provided for. A judgment entered under this section is an appealable judgment as in other cases."

While no case authority expressly defined "part of the plaintiff's claim," "part of a defense," "cause of action may be severed," or "issues remaining," such language implied that partial summary judgment could only be granted as to that portion of the action that constitutes an entire legal claim (a cause of action) or defense. This view was stated by Judge Ernest J. Zack in his article, "*California Summary Judgment: the Need for Legislative Reform*" (1971) 59 Cal.L.Rev. 439, 451: "In California, partial summary judgment is probably available only as to that portion of the action that could be severed *vertically* from the other portions in issue—a single cause of action, or portion thereof, for which all these legal

[11]Added by Stats. 1973, ch. 366, § 2, p. 807.

[12]Repealed by Stats. 1973, ch. 366, § 1, p. 807.

elements are shown to exist. 'A part of a claim' would, then, not include a legal element which could be revered *horizontally* —for example, the single issue of whether there is a contract. Thus, such an element could not be the subject of a partial summary judgment proceeding initiated by a plaintiff. Under federal practice, issues can be determined singly, or in groups—the severance can be vertical or horizontal. [Fn. omitted.]"

Judge Zack proposed a legislative amendment to section 437c to remedy this specific problem (59 Cal.L.Rev. at p. 476): "*If it appear from the affidavits that such defense applies to less than all the issues raised by plaintiff's claim, or that legal or factual support does not exist as to one or more issues raised by the plaintiff's claim, or that any of such issues is admitted or any issue raised by such defense is conceded, the court shall, by order, so declare, and the claim or defense shall be deemed established as to such issues as are by such order declared and the cause of action or defense may be* severed accordingly, and the action may proceed as to the issues remaining between the parties. No judgment shall be entered prior to the termination of such action but the judgment in such action shall, in addition to any matters determined in such action, award judgment as established by the proceedings herein provided for. The word 'action' as used in this section shall be construed to include all types of proceedings. *The word 'issue' as used in this section shall be construed to refer to any matter of material fact or law necessary to establish a cause of action, or a defense thereto, in a proceeding.*" According to its author, this amendment would allow "summary judgment on less than all of the elements of a claim. If he can convince the court there is no triable issue as to one element he is entitled to partial summary judgment on any part of the claim which such finding defeats . . . ." (*Id.*, p. 476.)

In 1973, former section 437c of the Code of Civil Procedure was repealed and the new section 437c was added. This new section provides in pertinent part:

"If it appears that the proof supports the granting of such motion as to some but not all the issues involved in the action, or that one or more of the issues raised by a claim is admitted, or that one or more of the issues raised by a defense is conceded, the court shall, by order, specify that such issues are without substantial controversy. At the trial of the action the issue so specified shall be deemed established and the action shall proceed as to the issues remaining.

". . . . . .

"Except where a separate judgment may properly be awarded in the action, no final judgment shall be entered on a motion for summary judgment prior to the termination of such action, but the final judgment in such action shall, in addition to any matters determined in such action, award judgment as established by the summary proceeding herein provided for.

"A summary judgment entered under this section is an appealable judgment as in other cases."

As the similarity in language demonstrates, this new section was based in relevant part upon Judge Zack's recommendations. (See also State Bar CAJ (Committee on Administration of Justice) Interim Report, Jan. 1973; 1972 State Bar Annual Report, 1972 Conference Resolution 9-1; CAJ Annual Report for 1971-72.) As stated in the CAJ Annual Report, "the purpose of the revision is to encourage the trial courts to dispose of as many issues as possible prior to the trial of an action."[13]

In accordance with this stated purpose, commentators have interpreted the change of wording from "cause of action" to "issues" as encouraging the salutory "use of partial summary judgments . . . . Since the length of a trial is directly related to the number of issues which must be argued, any procedure which can get major issues adjudicated in advance of the actual trial should result in saving considerable time and expense." (Comment, "*Civil Procedure, Summary Judgments,*" 5 Pac.L.J. 289, 294-295.) In Zack, "*The 1973 Summary Judgment Act—New Teeth for an Old Tiger*" (1973) 48 Cal. State Bar J. 654, 659, this section is construed as allowing relief on any single material issue, such as whether, in a breach of contract case, there is a contract, a breach, a release, etc.

We find nothing inherently unique about a conflict of laws issue which would preclude a court, upon a proper showing, from determining by summary judgment procedure which law should be applied. Certainly the major purpose of the statute, adjudicating issues in advance of trial so as to save considerable time and expense, would be served. Moreover, a similar procedure was implicitly approved by our Supreme Court in *Hurtado* v. *Superior Court, supra,* 11 Cal.3d 574. In *Hurtado,* the superior court bifurcated the issues of choice of law and liability, conducting a separate trial on the former wherein, based on the factual findings, a determination was made to apply California law. Hurtado's petition for

[13]As originally proposed, this section contained a statement entitled "Legislative Purpose in Summary Judgment Act Revision" wherein the above quoted "purpose" was recited. While the State Bar's recommended language for section 437c was adopted in full, the "Legislative Purpose" statement was not so enacted.

writ of mandate challenged this decision. The Supreme Court's decision denying the petition for peremptory writ left the case in a posture where the issue of liability could thereafter be tried under California law.

The practical effect of the *Hurtado* procedure is that the facts necessary to the choice of law determination are found first; the court determines the choice of law and later proceeds to try the facts necessary to determine liability in accordance with such choice. This order of disposition of these issues is equally advantageous when there is no triable issue as to the facts bearing upon the choice of law. Accordingly, summary disposition is mandated upon a proper showing, i.e., "that there is no triable issue as to any material fact . . ." determinative of the choice of law. No bifurcated trial is necessary; the court, based upon the established facts, determines the applicable law. Should such determination be dispositive as to an entire cause of action (for example, that New Mexico law is applicable and it precludes an action for wrongful death against Beech), then such determination might result in an appealable judgment (if there is no other cause of action between the same parties). Should the determination be dispositive as to some but not all of the issues necessary to dispose of any cause of action (for example, that California law need be applied and it permits wrongful death claims), then such issue would be deemed established and the action would proceed to trial as to the issues remaining. (3) Determinations of the second type do not result in appealable judgments. Determinations of either type that are not appealable are subject to review by writ of mandate upon an appropriate showing of the need therefor. (See *Hurtado, supra,* 11 Cal.3d at p. 579; *Whitney's at the Beach* v. *Superior Court, supra,* 3 Cal.App.3d at p. 266.)

We reject real parties in interest's assertion that any such determination not dispositive of an entire cause of action would not be binding on the trial judge. Section 437c of the Code of Civil Procedure expressly provides that such issues may be "deemed established" with the action proceeding only "as to the issues remaining." Accordingly, unless a challenge is made by way of writ, the trial court would have no power to reevaluate such determinations.

The Choice of Law Issue as to the Existence of a Wrongful Death Claim Against Beech Has Become Moot

(4) When petitioners first moved for summary judgment, New Mexico law arguably differed from California law in that it perhaps

denied the existence of a wrongful death cause of action against the manufacturer of the equipment of a common carrier. Subsequent to the lower court's order denying a summary judgment and prior to petitioner's initiation of this proceeding, the New Mexico Supreme Court declared that such interpretation of New Mexico law was erroneous, saying in this respect: "The manufacturer of a 'public conveyance' can be held liable for damages where the passengers died as a result of defects in the conveyance . . . ." (*Langham, supra,* 543 P.2d at p. 489.) Thus, the laws of California and of New Mexico are now identical in this respect. Under either state's law a cause of action for wrongful death will lie against Beech.

Such being the case, the choice of law issue as regards the existence of the wrongful death claim is moot. As stated in *Hurtado* v. *Superior Court, supra,* 11 Cal.3d at p. 580: "The fact that two states are involved does not in itself indicate that there is a 'conflict of laws' or 'choice of law' problem. There is obviously no problem where the laws of the two states are identical."

Petitioners Have Not Made the Proper Motion and Showing Necessary to Mandate the Superior Court's Determination of Choice of Law as to Issues Other than the Issue as to the Existence of a Wrongful Death Claim

(5) The mootness of the choice of law issue as to the existence of a wrongful death claim does not effect the resolution of other choice of law issues in the case. Each choice of law issue requires separate consideration.

California's use of the governmental interest approach requires "an analysis of the respective interests of the states involved . . . the objective of which is 'to determine the law that most appropriately applies *to the issue involved.*' (Italics added.) *Reich* v. *Purcell, supra,* [67 Cal.2d 551 (63 Cal.Rptr. 31, 432 P.2d 727)] at p. 554." (*Hurtado* v. *Superior Court,* 11 Cal.3d 574, 579-580; see also *Bernhard* v. *Harrah's Club,* 16 Cal.3d 313, 316 [128 Cal.Rptr. 215, 546 P.2d 719].) Petitioner has asserted that differences in California law and New Mexico law exist as to (1) product liability substantive law, (2) indemnity, and (3) contribution between

defendants.[14] Assuming that there are such differences, the respective interests of the states involved relating to these issues are not necessarily the same as those concerning the existence of wrongful death claims. Hence, the governmental interest approach requires a separate analysis with respect to each of these issues.

This position has been impliedly supported by Beech in another context. Thus, Beech successfully asserted that California law should control insofar as punitive damages were concerned while contending that New Mexico law should control the issue as to the existence of an action for wrongful death.

Moreover, such a position is inherent in the forum's application of its "procedural" rules when applying another state's "substantive" law. Commentators have urged that the forum state applies its own procedural law because, as the forum, it is the only state with an interest in having its procedural law apply. (See Horowitz, "*The Law of Choice of Law in California—a Restatement*" (1974) 21 U.C.L.A. L.Rev. 719, 742.) The choice of law question must, therefore, be examined individually as to each issue.

(6) In ruling on the sufficiency of petitioner's showing with respect to the choice of law issues which have not been rendered moot, cognizance must be taken of the changes to Code of Civil Procedure section 437c which went into effect January 1, 1974, bearing upon the showing required to establish the nonexistence of triable issues. These changes have, to some extent, liberalized the showing necessary.[15] They have not,

[14]Petitioner claims (1) that in product liability, "Unlike California's liberal strict liability doctrine, New Mexico retains the 'unreasonably dangerous' standard promulgated by the American Law Institute, in section 402A of the Restatement of Torts," (2) in indemnity, "New Mexico law merely requires a showing of active/passive negligence . . . [while] California law . . . requires the additional showing of either a legal or 'special' relationship between the parties, and (3) that "New Mexico statutorily allows for contribution while California does not."

[15]Section 437c now provides in pertinent part that (1) a granting of the motion is now mandatory in proper cases where "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," (2) a "court shall consider all of the admissible evidence set forth in the papers and all inferences reasonably deducible from such evidence," in determining whether there are such triable issues, and (3) with certain discretionary exceptions, "summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment . . . ." The statute also provides the court with discretionary powers, i.e. "If it appears from the affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or

however, changed the following existing rules, among others: (1) the strict evidentiary and substantive requirements for the moving declarations (*Blair* v. *Pitchess*, 5 Cal.3d 258, 284-285 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]; *Corwin* v. *Los Angeles Newspaper Service Bureau, Inc.*, 4 Cal.3d 842, 851-852 [94 Cal.Rptr. 785, 484 P.2d 953]), (2) the duty of a moving party to set forth with particularity competent evidentiary facts sufficient to establish every element necessary to a ruling in his favor, the opposing party having no obligation to file counteraffidavits to defeat the motion, unless the moving party meets this burden (*Residents of Beverly Glen, Inc.* v. *City of Los Angeles*, 34 Cal.App.3d 117, 127 [109 Cal.Rptr. 724]), (3) the liberal construction of opposing affidavits if filed (*Lacy* v. *Laurentide Finance Corp.*, 28 Cal.App.3d 251, 256 [104 Cal.Rptr. 547], and (4) the opposing party's ability to rely on his adversary's pleadings to establish facts not contained in his own affidavits (*Parker* v. *Twentieth Century-Fox Film Corp.*, 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 474 P.2d 689, 44 A.L.R.3d 615]). (See Zack, "*The 1973 Summary Judgment Act, New Teeth for an Old Tiger*," 48 Cal. State Bar J. 654.)

(7a) While real parties in interest contend that they "would certainly not stipulate" to "facts" set forth in the Beech affidavits, these rules require them, if the moving parties' affidavits are sufficient to grant summary judgment, to file counter-affidavits demonstrating factual differences. **(8)** When no affidavits are filed in opposition, the court is entitled to accept as true the facts alleged in the movant's affidavits if such are within the affiants' personal knowledge and are ones to which he could competently testify. (*Truslow* v. *Woodruff*, 252 Cal.App.2d 158, 164 [60 Cal.Rptr. 304].) **(7b)** However, real parties in interest's failure to file any counter-affidavits does not serve to cure deficiencies in petitioner's showing.

Whether or not sufficient "evidentiary facts" were set forth with respect to the choice of law as to the existence of a wrongful death cause of action, the affidavits and moving papers were deficient in respect to the other claimed differences in New Mexico and California law—products liability, indemnity and contribution.

Though petitioner's motion sought a declaration that "New Mexico law is the applicable law in determining the rights and liabilities of the parties," the sole reference in the moving papers to any but the wrongful

order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as may be just."

death issue appears in Beech's "Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment," wherein Beech states: "New Mexico has a predominant interest in applying its product liability law (and its indemnity law) to defendant Beech who has sold a product in New Mexico to a New Mexico defendant (Ross)."

No citation of authority supports this statement. Moreover, it is factually incorrect and unsupported by the affidavits. First, the record does not demonstrate that Beech sold the product to Ross in New Mexico. In fact, Beech's petition for writ of mandate states that Beech sold this particular aircraft to a distributor and that it eventually was acquired by Air South (whose place of incorporation and principal place of business Beech does not name) who in turn sold it to Ross; second, the affidavit of J. A. Elliott (see fn. 3, *supra*) indicates all of Beech's sales technically were made in Kansas. Last, Ross is not a defendant in either the instant actions or the New Mexico actions; rather, it is a plaintiff in the consolidated California actions. Consequently, insofar as Beech's motion may have sought a declaration that New Mexico law should apply to the issue of products liability substantive law, indemnity, and contribution, we find Beech's moving papers and affidavits to be insufficient to justify such a ruling, since neither party adequately addressed the issues and facts surrounding these aspects of the case. Indeed, Beech's counsel admitted at the hearing on the motion that he did not want to "get bogged down" into such matters, the issue before the court being "who has the preponderate interest in applying their wrongful death statute . . . ." Accordingly, we find the court correctly denied summary judgment on these issues, nor can they be decided in this court on the present record. The solution of these issues should be left to further proceedings in the trial court where all parties may be given an opportunity adequately to present the facts and brief the issues relating thereto.

The Lower Court Should Weigh the Following Facts and Policies in Determining Choice of Law

As heretofore pointed out, the showing made in the trial court does not permit definitive disposition of the remaining choice of law issues. The following general observations are submitted for the guidance of the trial court in any further proceedings therein.

General rules of choice of law were set forth in *Hurtado* v. *Superior Court*, *supra*, 11 Cal.3d at p. 581: "As the forum, California 'can only apply its own law' (*Reich* v. *Purcell*, *supra*, at p. 553). **(9)** When the forum undertakes to resolve a choice-of-law problem presented to it by the litigants, it does not choose between foreign law and its own law, but selects the appropriate rule of decision for the forum to apply as its law to the case before it. (*Reich* v. *Purcell*, *supra*, at p. 553.) Therefore, when the forum state undertakes its 'search to find the proper law to apply based upon the interests of the litigants and the involved states' (*Reich* v. *Purcell*, *supra*, at p. 553), it is understood that '[n]ormally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.' (Currie, *op. cit. supra*, at p. 183.) 'Only "when it is suggested that the law of a foreign state should furnish the rule of decision" must the forum determine the governmental policy of its own and the suggested foreign laws, preparatory to assessing whether either or both states have an interest in applying their policy to the case.' (Kay, *Comments on Reich* v. *Purcell*, 15 U.C.L.A. L.Rev. 584, 585.) **(10)** In short, generally speaking the forum will apply its own rule of decision unless a party litigant timely invokes the law of a foreign state. In such event he must demonstrate that the latter rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it. (Currie, *op. cit. supra*, at pp. 1-76, 177-187; Symposium, *Comments on Reich* v. *Purcell*, 15 U.C.L.A. L.Rev. 551.)"

(11a) California law should, therefore, be applied unless petitioner can show New Mexico law furthers the interest of the foreign state and that it is the appropriate law for the forum to apply.

(12) If it is shown that New Mexico does have an interest, "a true conflict" may arise as to which state's law to apply. When faced with a "true conflict," a resolution requires a determination of "which state's interest would be more impaired if its policy were subordinated to the policy of the other state." (*Bernhard* v. *Harrah's Club*, *supra*, 16 Cal.3d 313, 320.)

(13) In terms of products liability substantive law, New Mexico law apparently differs from California law only insofar as it requires, in a strict liability case, that the defect leading to the injury be "unreasonably dangerous." In *Cronin* v. *J. B. E. Olson Corp.*, 8 Cal.3d 121, 132 [104 Cal.Rptr. 433, 501 P.2d 1153], our Supreme Court rejected this requirement, finding it "burdened the injured [party] with proof of an element which rings of negligence." *Cronin* further states: "[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." (8 Cal.3d at p. 129, quoting *Escola* v. *Coca Cola Bottling Co.*, 24 Cal.2d 453, 462, J. Traynor concurring.) **(11b, 14)** Given this strong expression of forum interest and the presence of the California defendant, Adams-Rite, manufacturer of the defective latch, we feel that, absent a strong showing that application of New Mexico law would "further the interest" of that state, forum law should apply to the instant case. In this regard, we reject petitioner's assertion that Adams-Rite is an inconsequential defendant. A reading of the record illustrates that Adams-Rite has been actively involved in this litigation: Adams-Rite successfully moved for a change of venue to Los Angeles, was first to demur to plaintiff's fourth cause of action seeking punitive damages, and first brought Ross into the litigation. The active participation of Adams-Rite confirms the impression that its potential liability is not "inconsequential."

A similar analysis should be applied regarding the policies underlying the differences in California's and New Mexico's indemnity and contribution laws. Again, Adams-Rite should not be considered an "inconsequential defendant" for such purposes.

As hereinbefore stated, the outcome of this analysis of respective interests shall be dependent upon the showing made at any further hearing on this subject.

Disposition

The alternative writ of mandate is discharged, and the petition for a peremptory writ is denied.

Ford, P. J., and Allport, J., concurred.

ROBERT W. HARDIN
Attorney at Law
2127 West Ball Road, Suite A
Anaheim, California
October 5, 1976

Robert Gardner
Presiding Judge
Court of Appeal
State of California
Fourth Appellate District, Div. 2

RE: McIntosh vs. Anaheim Union High School District 4 Civ. NO. 15752 COUNTY NO. 222749

Dear Judge Gardner:

I have just received California Official Reports No. 26 in which Beach Aircraft Corp, petitioner vs. Aanestad, et al., cites the rules for a Motion for a Summary Judgment. Based upon this decision, attached photocopy of the Court of Appeals outline of the facts and policies to be weighed, I respectfully request that you grant a rehearing since the defendant's declarations on the Motion for Summary Judgment did not state facts sustaining every element necessary for a ruling in his favor. Therefore the Motion for a Summary Judgment should have been denied.

Respectfully submitted,
ROBERT W. HARDIN

RWH/m
cc: McKay & Byrne
P.S. Please note number (6) of the attached photocopies.

Appendix No. 6

IN THE
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
STATE OF CALIFORNIA
DIVISION TWO
4 Civ. No. 15752
REMITTITUR
SUPERIOR COURT NO. 222749
COUNTY OF ORANGE

FREDERICK JUDE McINTOSH
Plaintiff and Appellant
vs.
KATHLEEN GARNET TESKE, ET AL
Defendants and Respondents

I, ERVIN J. TUSZYNSKI, Clerk of the Court of Appeal, Fourth Appellate District, State of California, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on September 8, 1976 and this opinion or decision has now become final. Respondents to recover costs on appeal.

WITNESS my hand and seal of the Court this 8th day of November, 1976.

ERVIN J. TUSZYNSKI, Clerk
By Deputy

FILED
NOV 10, 1976
WILLIAM E. ST JOHN, County Clerk
By s/KMD Deputy

Appendix No. 7

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

NO. 222749
4 Civ. No. 15752
NOTICE OF FILING
REMITTITUR

FREDERICK JUDE McINTOSH,

Plaintiff

vs.

KATHLEEN GARNET TESKE, et al,

Defendant

TO: ROBERT W. HARDEN, AAL, 2127 West Ball Road, Anaheim, Ca. 92804; McKay & Byrne, 3250 Wilshire Blvd., L.A., 90010; Hon. H. Walter Steiner, Judge, Superior Court, Dept. 12, 700 Civic Center Drive West, Santa Ana, Ca. 92701.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that in the above entitled matter-----REMITTITUR was filed in this office on the 10th day of November, 1976, a copy of which is attached hereto and made a part of this notice.
DATED: November 15, 1976

WILLIAM E. ST JOHN, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Orange.

By H. J. Gallagher, Deputy
Appellate Division

Appendix No. 8

CLAIMS OF PUBLIC ENTITY IMMUNITY
WERE TRIABLE ISSUES

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

2nd Civ. No. 46217
Sup. Ct. No. 55428
OPINION ON REHEARING

THOMAS A. ANDERSON and
BETTY CLOUSE,

Plaintiffs and Appellants

v.

CITY OF THOUSAND OAKS,

Defendant and Respondent

APPEAL from a judgment of the Superior Court of Ventura County. Jerome H. Berenson, Judge. Reversed with directions.

Cohen, Cearnal, England, Whitfield & Osborne, and Thomas B. Osborne and Charles D. Christopher, for Plaintiffs and Appellants.

Don Dewberry, and Donal C. Fesler, for Defendant and Respondent.

Appellants Anderson and Clouse brought this action for the wrongful death of their son when the automobile in which he was riding failed to negotiate the curve of a road designed, constructed, and maintained by respon-

Appendix No. 9

dent City of Thousand Oaks. After responsive pleadings were filed, the city moved for summary judgment on the basis of several grounds of public entity immunity. Summary judgment was granted and the action was dismissed, whereupon appellant filed this appeal.

Facts

On the evening of November 4, 1972, appellants' son, Dennis Michael Anderson, was riding as a passenger in an automobile which was proceeding northbound along Lynn Road, approaching a section of the road which curves to the left in a 65 degree arc before reaching the Ventura Freeway. The automobile failed to negotiate the curve at a point near the Green Meadow Drive intersection and ran off the road, causing the death of both Anderson and the driver of the car. At the time of this occurrence, Lynn Road had been opn to the motoring public for just over one month, but the City of Thousand Oaks had not set up any caution signs or roadway striping of a type to warn northbound drivers proceeding at the legal rate of 65 miles per hour of the upcoming curve.

The wrongful death action subsequently filed by appellants set forth three alternate grounds of liability as to respondent city: (1) negligent maintenance of the roadway in a dangerous condition, insofar as the speed limit was 65 miles per hour while the design speed of the curve was 45 miles per hour; (2) negligent failure to provide speed or warning signs for the speeds in excess of 45 miles per hour; (3) the city was on notice of the dangerous condition of the roadway by virtue of a meeting of the Ventura County Traffic Safety Council on October 18, 1972.

In response to appellants' complaint, respondent denied liability on all county, set up numerous affirmative defenses, and then moved for summary judgment based upon the following three defenses: (1) design immunity for improvements of public property constructed pursuant to an approved plan (Gov. Code, §830.6); (2) lack of actual or constructive notice of any dangerous condition, inasmuch as the road was only recently built and was adequately inspected both in design and construction (Gov. Code, §§ 835, 835.2); and (3) sign placement immunity, where the failure to provide regulatory control signals did not consitute a condition endangering the safe flow of traffic (Gov. Code, §§ 830.4, 830.8). In support of its motion for summary judgment, the respondent included its counsel resolutions, design plans for the roadway, accident computer printouts, and declarations by its Director of Public Works and Assistant Traffic Engineer. Appellants opposed the motion with a declaration from a registered civil engineer stating that the Lynn Road curve had a design speed of 45 miles per hour, which, coupled with the safety factor built into the road, yielded a maximum safe speed of 55 miles per hour. It was further delcared that no signs, striping, or other indicators warned a northbound motorist that he would have difficulty negotiating the curve ahead at speeds in excess of 55 miles per hour. Finally, the expert concluded that, given the foregoing two factors, the roadway was in a dangerous condition when traveled in excess of 55 miles per hour, but within the 65 miles per hour zoned speed limit.

The trial court, without specifying the grounds of its decision, granted the respondent's motion for summary judgment. We find, however, that such a ruling was improper since appellants' proof controverting respondent's claims of immunity is sufficient to raise triable issues of fact.

Discussion

The granting of a motion for summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent's affidavits do not show such facts as may be deemed by the court sufficient to present a triable issue. (Code Civ. Proc., § 437c; **Stationers Corps.** v. **Dun & Bradstreet, Inc.**, 62 Cal. 2d 412, 417.) To prevail, therefore, the moving party's affidavits must set forth facts establishing every element necessary to sustain a judgment in his favor before defects in counteraffidavits need be examined. (**Corwin** v. **Los Angeles Newspaper Service Bureau, Inc.**, 4 Cal. 3d 842, 851.) On the other hand, it is axiomatic that counteraffidavits are construed liberally and need only set forth evidentiary facts supporting merely a possible 699), since the purpose of the summary judgment procedure is to determine if issues exist to be tried, rather than to try the issues (**Buffalo Arms, Inc.** v. **Remler Co.**, 179 Cal. App. 2d 700, 703). Examining the affidavits and counteraffidavits in the case at bench in light of these established rules, we must determine whether respondent has met its burden of establishing its immunity from liability for injury caused by the allegedly dangerous condition of its property.

Government Code section 835 provides for the liability of a public entity for injury caused by the dangerous condition of its public property (1) which is **created** by the negligence of a public employee acting within the scope of his employment (Gov. Code, § 835, subd. (a)), or (2) which may not be directly attributable to the public entity, but which **goes uncorrected** after the entity has notice of the condition in time to take corrective measures (Gov. Code, § 835, subd. (b)). (See note 1) Respondent claims summary judgment was proper as it is shielded from liability under the first prong of section 835 by either design immunity or by sign placement immunity, and is exempt from liability under the second prong because, as a matter of law, it had no notice of any dangerous condition along Lynn Road. We now proceed to discuss the sufficiency of respondent's proof as to each of these claimed immunities.

Note 1: Government Code, § 835 provides:
"Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

I

Design immunity, the first possible ground for the granting of the summary judgment, is an affirmative defense to liability for the dangerous condition of public property and as such it must be pleaded and proved by the defendant public entity. (**Hilts v. County of Solano,** 265 Cal. App. 2d 161, 175.) Under Government Code section 830.6. (see note 2) three basic elements must be established in order to claim this defense: first, a causal relationship between the plan and the accident; second, discretionary approval of the plan prior to construction; third substantial evidence supporting the reasonableness of the design. (**De La Rosa v. City of San Bernardino,** 16 Cal. App. 3d 739, 748; **Johnston v. County of Yolo,** 274 Cal. App. 2d 46, 51-52.) Because the existence of the first element is undisputed, we begin with a discussion of the latter two elements.

In examining the sufficiency of respondent's proof as to the elements of prior approval and reasonableness of approval of the Lynn Road plan, it will be helpful to bear in mind the rationale underlying design immunity.

Note 2: Section 830.6 sets forth the immunity for an approved plan as follows:
"Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where wuch plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

Basically, this defense is predicated upon the concept of separation of powers — that is, the judicial branch through court or jury should not review the discretionary decisions of legislative or executive bodies, to avoid the danger of "impolitic interference with the freedom of decision making by those public officials to whom the function of making such decisions has been vested." (**Cameron v. State of California,** 7 Cal. 3d 318, 326, quoting from 4 Cal. Law Revision Comm'n 823 (1963); see Van Alstyne, Calif. Gov. Tort Liability (1964), § 6.32.) Additionally, judicial economy underlies design immunity — forbidding a jury from reweighing the same factors considered by the governmental entity which approved the design. (See note 3) (**Baldwin v. State of California,** 6 Cal. 3d 424, 432, fn. 7.)

Respondent's showing of a detailed plan, drawn up by a competent engineering firm, and approved by the city council in the exercise of its discretionary authority, (see note 4) is certainly persuasive evidence of both

Note 3:
Other jurisdictions also view the immunity as a matter of competence, relegating decisions as to the sufficiency and adequacy of highway design to competent engineers, rather than to a jury of untrained laymen. (E.g., **Cumberland v. Turney,** 9 A.2d 561, 569; see 45 A.L.R. 3d 886-887.)

Note 4:
The issue was not raised (and it is thereby conceded) that the Thousand Oaks City Council, which approved the road improvement plans, was the proper body to exercise the discretionary authority referred to in sectin 830.6. Such approval, and the subsequent construction, took place (according to respondent's affidavits) in the following order: First, special counsel was employed for the formation of an assessment district for the improvements. Then, on September 10, 1970, the city contracted with McIntyre & Quiros, civil engineers, to provide plans and specifications for the construction at a cost not in excess of $31,000. The plans so provided were adopted on May 18, 1971, and re-adopted on November 16, 1971, since the project had to be reinstated for financing reasons. Construction was awarded to A. C. Construction Company, and on September 15, 1972, Lynn Road was open to traffic. On October 5, 1972, the road was formally approved as being in compliance with plans and specifications.

elements of prior approval and reasonableness for purposes of the design immunity defense. Appellants attempt to take this case outside the reach of design immunity, however, by characterizing the dangerous condition of the roadway as one which was not comprehended within the plan or design. In support of this position they cite **Cameron v. State of California,** 7 Cal. 3d 318. We disagree with appellants' characterization, and with the applicability of **Cameron** to the instant facts.

In **Cameron v. State of California, supra,** the California Supreme Court found that the design immunity defense did not apply in the case of an unevenly banked S-curve, where the plans for the curve failed to specify the degree of banking. In so holding the court reasoned that there would be no examination of a discretionary decision in contravention of the design immunity policy because no such decision had been proven. (7 Cal. 3d at p. 326.) Implicit in the court's reasoning was the assumption that the omission of banking or "super-elevation" figures from the plans indicated a failure to consider that element of design, and therefore the uneven banking of the road, as constructed, could not have been a **design**-created defect.

Appellants analogize the omission of warning signs preceding the curve in the instant case to the omission of superelevation figures in the **Cameron** case, claiming that this defect in the new roadway cannot be classified as a design defect. In our view, however, such an omission cannot as clearly be classified as a **failure to consider** an element of design. First, in such a comprehensive design as the one submitted to respondent, it is less likely that

the omission of some feature commonly associated with a roadway was not a conscious design choice. Second, the banking of a curve is more intimately associated with sound design than is the inclusion of warning indicators appurtenant to the curve. Speed reduction signs, and other indicators warning of an approaching curve, may not be necessary in many cases in which the curve is adequately visible to approaching motorists, and where it may safely be negotiated at the existing spped limit. Finally, there was mention of signing in these plans, at least with regard to approaching street intersections, indicating inferentially, at least, that other forms of signing had been considered and rejected. Thus to avoid the risk of interfering with a discretionary decision of the planning body, we are not willing to conclude that the absence of warning signs prior to the Lynn Road curve was not an element of the design. Since we have found that all the elements of design immunity were proven through respondent's affidavits, the respondent must be deemed to be immune from liability for the creation of a dangerous condition under subdivision (a) of section 835 of the Government Code.

II

In spite of respondent's immunity for a defectively designed roadway, a second independent ground of liability under subdivision (b) of Government Code section 835 elxists for its failure to warn of the dangerous condition if it had actual or constructive notice of such a condition. (See **Cameron v. State of California, supra,** 7 Cal. 3d 318, 329.) Respondent claims that its affidavits conclusively establish the absence of any actual or constructive notice of the dangerous condition. Yet, a

closer examination of the record compels the conclusion that at least a triable issue of fact exists with respect to notice.

We do not dispute that respondent's affidavits negate the fact that it was on actual notice of the danger posed by the Lynn Road curve. According to the respondent's Director of Public Works, he had not discovered any danger through investigation, nor had accidents. We do, however, dispute respondent's bare assertion that it was not on **constructive notice** of a dangerous condition in the new roadway.

A public entity is on constructive notice of a dangerous condition "only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov. Code, § 835.2, subd. (b).) It is undisputed that the new roadway existed without a speed zone from the time it was first opened to traffic until the accident occurred approximately six weeks later. Yet, the respondent as the party moving for summary judgment has failed to establish that the allegedly dangerous condition created thereby was not of such an obvious **character** that it could not have been discovered and remedied in that period of time.

The very fact that respondent through its Director of Public Works requested an investigation as to the necessity of posting a speed limit along the new section of Lynn Road indicates that there was a recognition of two facts: first, that the speed along the roadway was presently unrestricted, or subject only to the then-

existing legal limit of 65 miles per hour; (see note 5) second, that there might be some necessity to limit this speed in order to ensure that the curve be safely negotiated. Simply because the requested investigation conducted by the Ventura County Traffic Safety Council failed to disclose any reason for imposing such a speed restriction does not mean, however, that the respondent cannot fairly be charged with notice of the dangerous character of the curve, given the permissible speed of 65 miles per hour. (See Van Alstyne, California Government Tort Liability (Cont. Ed. Bar (1964) p. 210.) The respondent has still failed to show that a **reasonable** inspection would not have revealed the dangerous condition. (See **State of California v. Superior Court** (1968) 263 Cal. App. 2d 396, 400.) To this end, respondent has failed to set forth the exact nature of the investigation made by the Ventura County Traffic Safety Council.

Note 5:

Prior to the enactment of the temporary 55 mile per hour speed limit in 1973, section 22349 of the Vehicle Code established 65 miles per hour as the maximum allowable highway speed. This maximum speed applied to local public roadways and streets as well as state highways. (See Veh. Code, § 360.) If a local public roadway were unposted, as was the case here, only two basic limitations could have mandated a speed lower than the maximum: first, the basic speed law, which proscribes any speed faster than is reasonable under the circumstances (Veh. Code, § 22350), and second, prima facie speed limits, such as the 25 mile per hour limit established for any business or residential district (Veh. Code, § 22352). Neither respondent's affidavits nor the record affirmatively establish the presence of either limitation along the newly constructed portion of Lynn Road at the time of the accident. While respondents may be able to produce evidence at trial establishing the existence of a residential zone as defined in section 515 of the Vehicle Code, or the existence of a "reasonable" speed under the basic speed law, much lower than the 55 mile per hour safe speed around the Lynn Road curve, we cannot conclude on the basis of the showing made here, that the permissible speed was anything less than 65 miles per hour. For the purposes of this opinion, therefore, we are assuming that the legal rate along Lynn Road was 65 miles per hour.

Moreover, the council simply concluded that a speed zone installation was "premature," not that it was unnecessary. If the physical factors which rendered the curve unsafe at the legal speed limit were readily apparent to anyone attempting to negotiate the curve at that speed, then the defect certainly was of such a character as to charge the city with notice. Furthermore, if from the plans themselves it might readily be ascertained that the curve had a design speed of 45 miles per hour then certainly respondent, as designer, must be charged with knowledge of that fact. Accordingly, because respondent has failed to demonstrate the hidden or inconspicuous nature of the defect in the roadway rendering it unsafe at speeds in excess of 55 miles per hour, it therefore cannot exempt itself from liability for failure to warn of a known dangerous condition under subdivision (b) of Government Code section 835.

III

Sign placement immunity under Government Code sections 830.4 (see note 6) and 830.8 (see note 7) is the

Note 6:

Section 6: Section 830.4 provides as follows:

"A condition is not a dangerous condition within the meaning of this chapter **merely because** of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code." (Emphasis added.)

Note 7: Section 830.8 provides:

"Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care."

third possible ground for the granting of a summary judgment in favor of the City of Thousand Oaks. The broad discretion allowed a public entity in the placement of road control signs is limited, however, by the requirement that there be adequate warning of dangerous conditions not reasonably apparent to motorists. (Gov. Code, § 830.8.) Consequently, a public entity is not shielded from liability under subdivision (b) of section 835 for the maintenance of a dangerous condition in its property, if it fails to post signs in circumstances consituting a trap to the motorist. (See **Bakity v. County of Riverside,** 12 Cal. App. 3d 24, 31; **Teall v. City of Cudahy,** 60 Cal. 2d 431, 433-434.) Appellants' averments in their counteraffidavit as to the speed parameters of the Lynn Road curve seem to illustrate the kind of trap contemplated by section 830.8. Accepting these averments as true, it cannot be said that appellants do not state a triable issue of fact as to the dangerousness of the curved section of Lynn Road given an allowable speed of 65 miles per hour. Without any warnings prior to the curve, even a cautious driver might well commit himself to the curve at a speed ten miles per hour in excess of the maximum safe speed, posing the grave danger of either losing control of his automobile or of leaving the roadway. We conclude, therefore, that the trial court erred if it granted summary judgment in respondent's favor on the basis of sign placement immunity.

The order is reversed with a direction to vacate the order granting a summary judgment. Costs to appellants.

STEPHENS, Acting P.J.

We concur:

ASHBY, J.

HASTINGS, J.

COURT OF APPEAL — SECOND DIST.
FILED
DEC 20, 1976
CLAY ROBBINS, JR., Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION ONE

2d Civil No. 49009

[Sup.Ct.No. SW C33629]

BENITA CLINE,

Plaintiff and Appellant

v.

JAMES A. WATKINS,

Defendant and Respondent

APPEAL from an order of the Superior Court of Los Angeles County. John A. Shidler, Judge. Reversed.

Archer Zamloch for Plaintiff and Appellant.

Charvet and Smith, and James A. Watkins for Defendant and Respondent.

In the matter at bench, we are called upon to determine whether the substitution of new counsel who negligently fails to cure the results of negligence of prior counsel in representation of his client in pending litigation relieves the first attorney of liability. Concluding that the issue must be decided on the basis of the reasonable foreseeability of the second lawyer's failure and that foreseeability in this context is a question of fact, we reverse a judgment entered in favor of the first lawyer on his general demurrer.

Plaintiff filed her first amended complaint naming Jack D. Scott and James A. Watkins as defendants. The pleading alleges that "[d]uring a period commencing on or about January, 1969, and continuing until August 28, 1975 defendants, who at all times

mentioned . . . were attorneys at law . . . undertook to and did represent and provide legal services to plaintiff . . . and were plaintiff's attorneys of record in Los Angeles Superior Court Divorce and dissolution action entitled Cline v. Cline, No. SWD 25070, and did negligently represent plaintiff and perform said legal services so as to cause plaintiff to be deprived of her community share of community property of the parties to said action in the nature of a vested pension earned by her husband during the course of the marriage between plaintiff and her husband, and to be damaged thereby in the sum of $200,000.00 plus interest thereon . . . ."

Watkins filed a general demurrer to the amended complaint. The notice of hearing on the demurrer requests the court to take judicial notice of a substitution of attorneys and the interlocutory judgment entered in the dissolution action. At hearing on the demurrer, the trial court, with the acquiescence of the parties, took judicial notice of the entire file in the dissolution proceeding.

That file discloses that Watkins, as attorney of record for plaintiff, filed a "complaint for divorce" on January 21, 1969. The complaint lists seven specific items of property claimed to be community plus a catch-all allegation of "[v]arious other items of community property, the exact nature and extent of which is unknown . . . ." Plaintiff's intention to seek leave to amend the complaint to conform to proof of additional community property at trial is stated. Plaintiff's husband answered and cross-complained.

On May 13, 1969, a substitution of attorneys was filed relieving Watkins and substituting plaintiff in pro. per. in the dissolution proceedings. On May 20, 1969, Scott, as plaintiff's attorney of record, filed an answer to the cross-complaint together with a substitution of attorneys. While a declaration of plaintiff's husband filed on June 19 recites that he was receiving $376.15 per month in "Air Force Retirement pay," plaintiff's community interest in the

pension was not asserted in the dissolution action. Plaintiff was awarded judgment on her complaint without reference to her community interest in the Air Force pension of her husband.

Stating: "[S]ince [Watkins] was dismissed before the OSC or the interlocutory . . ., as a matter of law . . . his negligence couldn't have caused [plaintiff] any injury," the trial court sustained Watkins' demurrer without leave to amend. This appeal from the ensuing judgment of dismissal followed.

The trial court erred in its ruling.

The failure of an attorney to assert his client's community property interest in a federal pension plan supports the factual inference that the attorney was negligent in the representation of his client's interest. (**Smith** v. **Lewis** (1975) 13 Cal.3d 349, 360, disapproved on unrelated grounds in **In re Marriage of Brown** (1976) 15 Cal.3d 838, 851.) "[A]n attorney's negligence need not be the **sole** cause of his client's loss in order to subject him to liability. That is to say, where there is causation in fact it need not be the sole proximate cause." (**Starr** v. **Mooslin** (1971) 14 Cal.App.3d 988, 1002; emphasis in original.)

Here the amended complaint alleges that Watkins, along with Scott, was negligent in failing to assert plaintiff's community interest in her husband's Air Force pension. (note 1) Here the amended complaint alleges that Watkins' negligence was a cause of

Note 1

We disagree with the dissent's conclusion that as a matter of law the standard of reasonable care does not require an attorney to conduct at least a cursory investigation of the facts bearing on his client's claim to relief in the early stages of litigation. Here nothing more than a careful client interview would have disclosed the pension. In our view, the question must be treated as one of fact and not law. Otherwise, it is unduly influenced by the personal view of the practice of law held by an individual judge. What to one judge was routine preparation of litigation when he practiced law is the function of a "swami" (dissenting opinion, p. 18) to another.

plaintiff's damage. We thus reach directly the issue of whether the negligence of Scott disclosed by the file in the dissolution action to have occurred after that of Watkins is a superseding cause which as a matter of law excuses the latter from liability. (Rest. 2d Torts, § 440.)

In general, if the risk of injury is reasonably foreseeable, the defendant is liable. An independent intervening act is a superseding cause relieving the actor of liability for his nigligence only if the intervening act is highly unusual or extraordinary and hence not reasonably foreseeable. (4 Witkin, Summary of Cal. Law (8th ed.) Torts, § 628; Rest. 2d Torts, §§ 435, 447.) Reasonable foreseeability in this context is a question for the trier of fact. The declaration of rules restricting the actor's responsibility for his negligence is a question of law. (Rest. 2d Torts, § 453.)

Restatement Second of Torts section 452 (approved by the Court of Appeal in **Fish** v. **Los Angeles Dodgers Baseball Club** (1976) 56 Cal.App.3d 620, 635-636) states: "(1) Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm. (¶) (2) Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause."

By reason of subsection (1) of section 452, the originally negligent actor generally remains liable although a third person negligently fails to discharge a duty to take affirmative action which would have prevented the harm if the third person's conduct is reasonably foreseeable. (Comments "a" - "c" to §452.) Subsection (2) of Restatement Second of Torts section 452 applies only in exception al circumstances to relieve the original actor of the foreseeable consequences of his act. In those exceptional circumstances, the duty and hece entire resonsibility is shifted from the original actor

to the third person. (Comment "d" to § 452.) In some circumstances, responsibility may be shifted by agreement between the actor and the third person. (Comment "e" to §452.) In the absence of agreement, "the circumstances may be such that the court will find that all duty and responsibility for the prevention of harm has passed to the third person." (Comment "f" to § 452.)

Here the trial court treated Watkins as absolved from liability for negligence as a matter of law because of the failure of Scott to prevent the harm ordinarily flowing from Watkins' negligence from occurring. The issue having been resolved as a matter of law and not by a trier of fact on the question of foreseeability, we are required to determine the applicability of subsection (2) of section 452 of the Restatement Second of Torts to the situation of the case at bench.

Applicability of subsection (2) turns upon an issue of public policy not previously considered in California. Is the substitution of another lawyer for one whose prior representation of the client in the matter has been negligent such an exceptional circumstance that all duty and responsibility for the prevention of harm normally flowing from the negligence passes to substituted counsel?

We conclude that the policy question must be answered in the negative.

Except for a still developing certification of a few specialties, the bar supplies no means of assessing the qualifications of its members. A member of the public seeking the services of a lawyer thus has no real means of determining his capability. Nor has a member of the public engaging the services of a lawyer any real means of gauging the quality of service performed. Where a lawyer originally retained is relieved and another substituted, the client is likely to have some general dissatisfaction with the quality of service of the original lawyer but is unlikely to be aware of any specific reason for the dissatisfaction although a legitimate reasón exists.

The same lack of means to assess lawyer quality which results in the retention of a negligent lawyer in the first instance may well result in his being replaced by another negligent lawyer when the client acquires the vague uneasiness that the first is not doing what he should.

In these circumstances, lawyers are not entitled to special treatment in the form of special relief from the consequences of their negligence that is not afforded other professions. As a negligent physician is not relieved of the consequences of his lack of care because a subsequently treating physician could have avoided the injury had he not also been negligent (**Fish v. Los Angeles Dodgers Baseball Club, supra,** 46 Cal.App.3d 620), so also should a negligent lawyer not be relieved because he is replaced by another. True enough, the new lawyer assumes full responsibility for the matter and has exclusive control over it; but so also does the new physician assume full responsibility and have full control.

We thus conclude that the case at bench is governed by the tenants of subsection (1) rather than subsection (2) of sectin 452 of the Restatement Second of Torts. The issue of the proximate causation of damage flowing from Watkins' negligence is thus one of foreseeability to be determined by the trier of fact and not on demurrer.

The judgment is reversed.

CERTIFIED FOR PUBLICATION

THOMPSON, J.

I concur:

LILLIE, Acting P.J.

I dissent.

As described in the majority opinion in the case at bench plaintiff/appellant Benita Cline (hereinafter Wife) appeals from the trial court's sustaining defendant/respondent James A. Watkins' (hereinafter attorney Watkins) general demurrer to Wife's first amended complaint for alleged legal malpractice. Wife's claim of malpractice is based on her assertion that attorney Watkins negligently represented her as plaintiff in a divorce action (Benita Gannon Cline v. Robert Harry Cline, Superior Court No. SWD 25070) which deprived her of her community share of her husband's Air Force retirement pay.

Attorney Jack D. Scott (hereinafter attorney Scott), who later represented Wife in the underlying divorce action, is also a named defendant in the instant legal malpractice suit but is not a party to this appeal.

THE UNDERLYING DIVORCE ACTION

Pursuant to rule 12(a) of the California Rules of Court, the file of Benita Gannon Cline v. Robert Harry Cline, No. SWD 25070, of which the court below in the malpractice case took judicial notice, has been ordered up and reviewed. It, in pertinent part, reflects the following:

On January 21, 1969, attorney Watkins filed a Complaint for Divorce for Wife against her husband, Robert Harry Cline (hereinafter Husband). Paragraph V. of the complaint listed as community property the home and furnishings, three automobiles, one hundred shares of stock, and various insurance policies. Husband's Air Force Retirement pension was not listed but paragraph V concludes as follows: "(8) **Various other items of community property, the exact nature and extent of which is unknown to plaintiff at this time, and plaintiff will therefore ask leave of Court to amend her complaint to conform to proof at the time of Trial."** Emphasis added.)

On May 1, 1969, counsel for defendant Husband filed an Answer to Complaint and a Cross Complaint for Divorce which were served on attorney Watkins.

On May 13, 1969, plaintiff Wife appearing "in pro per" filed a Substitution of Attorney declaring she "hereby substitutes herself In Pro Per . . . as attorney(s) of record in place and stead of JAMES A. WATKINS." The substitution of attorney shows that on April 17, 1969, it was signed by Wife, consented to by attorney Watkins, and that the "Above substitution [was] accepted" by Wife.

On May 20, 1969, another Substitution of Attorneys was filed which stated "Plaintiff and Cross-Defendant BENITA GANNON CLINE hereby substitutes JACK D. SCOTT, . . ., as attorney of record in place and stead of herself, In Pro Per," which "substitution [was] accepted" by attorney Scott.

On June 10, 1969, the order to show cause (OSC) re attorney fees, costs, alimony, etc. and restraining order was continued to June 19, 1969, by stipulation of counsel.

On June 19, 1969, the OSC was heard and the order included an award of $300 as attorney's fees for attorney Scott. On the same date (**June 19, 1969**) a document entitled Declaration of Husband on Order to Show Cause (dated and signed June 6, 1969) was filed with the court showing Husband had additional income of $376.15 a month from Air Force Retirement pay, which coupled with $1,452.65 monthly net take-home pay, aggregated a total monthly income of $1,828.80. (It is the $376.15 monthly Air Force Retirement pay which is involved in the case at bench.)

On June 25, 1969, an At-Issue Memorandum was filed by Husband's counsel showing attorney Scott as attorney for plaintiff Wife.

On June 30, 1969, a Certificate of Readiness was filed signed by the attorneys of record which included the signature of attorney Scott.

On July 10, 1969, Notice of Assignment of Trial or Hearing Date was filed and mailed to counsel, including attorney Scott, by the clerk of the court.

On July 14, 1969, counsel for Husband served by mail on attorney Scott a Notice of Trial. The trial was set for October 21, 1969.

On August 29, 1969, attorney Scott, Wife's attorney of record, filed and served Interrogatories Propounded to Defendant Robert Harry Cline, which were primarily directed at ascertaining outstanding obligations of the community property. The Answers to Interrogatories were filed September 24, 1969.

On October 21, 1969, the court minute order shows, by stipulation, the trial was continued to November 18, 1969. "Counsel for Plaintiff [Wife] Jack D. Scott."

On November 18, 1969, the trial commenced with attorney Scott as the sole attorney of record for plaintiff Wife. On the same date the court file reflects another Declaration of Husband on Order to Show Cause was filed showing $375.16 as "other income" but not indicating the "source" as Air Force Retirement pay as reflected in the same form filed at the OSC hearing on June 19, 1969.

On December 8, 1969, plaintiff Wife was granted an interlocutory judgment of divorce and all other matters were taken under submission. A subsequent order of January 26, 1970, disposed of the community property without mention of the Air Force Retirement pay and additional attorneys' fees were awarded to attorney Scott in the sum of $1,615. (see note 1)

On April 28, 1970, an Interlocutory Judgment of Dissolution of Marriage was signed by the court and filed.

THE LEGAL MALPRACTICE ACTION AT BENCH

Attorney Watkins' general demurrer in the case at bench requested the court to take judicial notice of the original file in the dissolution proceedings. The trial judge's attention was particularly directed to: (1) the substitution of attorneys executed on April 17, 1969, and filed May 13, 1969, by which Wife, in pro per, was

Note 1

The record is silent as to the fee recieved by attorney Watkins, if any.

substituted in place and stead of attorney Watkins as attorney of record for Wife; (2) the substitution of attorneys filed May 20, 1969, wherein attorney Scott became attorney of record for Wife; and (3) the interlocutory judgment of dissolution of marriage filed on April 28, 1970. The court was requested to take judicial notice of these documents pursuant to Evidence Code sections 452 and 453.

The trial court determined after reviewing the superior court file that since defendant attorney Watkins was dismissed as Wife's counsel prior to the hearing on the OSC that his (Watkins') negligence if any was not the proximate cause of Wife's claimed injury as a matter of law. (see note 2)

Note 2

Following is colloquy contained in the reporter's transcript of the hearing on defendant attorney Watkins' general demurrer conducted on April 28, 1976:

"THE COURT: How long was Watkins in the saddle?

"[Defense attorney]: Watkins was in —

"[Plaintiff's attorney]: Four months, I believe, Your Honor.

"[Defense attorney]: Watkins was in from January '69 to May '69, four months approximately, and then six months more approximately lapsed before the actual trial was in December.

"Now, it seems to me that when a lawyer is relieved, substituted out, he is discharged. If you want to make an analogy to a medical malpractice, if you go to a physician for a sore throat and tell the physician you have a sore throat and the physician treats you and then you say, I don't like what you did, you are discharged, and then you go to another physician, the first physician has no responsibility.

"THE COURT: He might have. Supposing he put, instead of zinc oxide, he put in some kind of acid or something in his throat.

"[Defense attorney]: If that was shown to be a cause of the injury, yes. But there is nothing in these pleadings. There is nothing to show that was the cause of the failure of Scott to prove, or the court to include, whatever it was, any disposition of this item.

"THE COURT: Still certainly if he had listed it, it would have brought it to Scott's attention, wouldn't it?

"[Defense attorney]: If he knew about it.

"THE COURT: If Watkins had put it in his complaint.

"[Defense attorney]: If Watkins had put it in his complaint, that's true, but there is something that shows that Scott knew about it.

On appeal Wife contends the trial court erred in sustaining attorney Watkins' general demurrer and that his negligence in failing to advise her of her community interest in Husband's military

Note 2 continued

"THE COURT: Well, were there any interrogatories?

"[Defense attorney]: Yes. I will show you what they were. One second, please. In the declaration of the husband on the Order to Show Cause.

"THE COURT: What was that again, please?

"[Defense attorney]: In the declaration of husband on Order to Show Cause which was filed June 19, 1969, after Watkins was relieved. He was relieved in May. The husband files a declaration of husband in Order to Show Cause and says, 'If you have any other income, state how much and from what source. Otherwise, state none.'

"He says, 'Week, $376.00, net aggregate monthly total of $1,828.00. Source, Air Force retirment pay.'

"That's what we are talking about, isn't it, counsel?

"[Plaintiff's attorney]: Yes, yes.

"[Defense attorney]: So that when Mr. Scott represented this lady on the Order to Show Cause, that was June 19, 1969, and the hearing on the Order to Show Cause to place on June 19, 1969, counsel, Mr. Scott, was aware of this Air Force retirement. He had to be because he tried literally that day this Order to Show Cause based on this declaration.

"Now, let me see just one second.

"THE COURT: Well, is there anything else, gentlemen? I have to rule on these matters. I always do rule.

"[Defense attorney]: All I can see, Your Honor, is —

"THE COURT: There's no cases except by analogy.

"[Defense attorney]: Well, there is one case —

"THE COURT: I will rule that the demurrer is sustained without leave to amend.

"[Defense attorney]: Thank you, Your Honor.

"THE COURT: And that way you've got —

"[Plaintiff's attorney]: Going to appeal.

"THE COURT: You've got a sharp thing to put up.

"[Plaintiff's attorney]: May we state the grounds, also?

"THE COURT: Yes.

"[Plaintiff's attorney]: That the intervening negligence, alleged negligence of Scott exonerates any negligence on the part of the defendant Watkins during the time he represented.

"[Defense attorney]: I think it's more likely that Watkins was discharged by the substitution of attorneys and that there is no showing that anything he did constituted negligence or cause.

pension and in failing to protect that interest during the time he represented her constituted a concurrent proximate cause of her loss.

DISCUSSION

In the case at bench the trial court properly took judicial notice of the superior court file in the underlying divorce action (SWD 25070) not only by reason of the statutory mandate of Evidence Code sections 452 (see note 3) and 453 (see note 4) but by case law

Note 2 continued

"THE COURT: Well, it's an allegation, isn't it? Not showing really.

"[Plaintiff's attorney]: We allege that he was negligent and —

"THE COURT: And I am saying that since he was dismissed before the OSC or the interlocutory that he couldn't, as a matter of law he, his negligence couldn't have caused her any injury.

"[Plaintiff's attorney]: I don't know that he was dismissed before the OSC, Your Honor.

"[Defense attorney]: Yes, he was, This file shows. Would the court show that it is taking judicial notice of file SW D 25070?

"THE COURT: Yes. There you have the matter squarely before you.

. . ."

Note 3

Evidence Code section 452 provides, in pertinent part, as follows:

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

"(a) The decisional, constitutional, and statutory law of any state of the United States . . .

"(b) . . .

"(c) . . .

"(d) Records of (1) any court of this state . . .

"(e) . . .

"(f) . . .

"(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

"(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Note 4

Evidence Code section 453 provides, in pertinent part, that "The trial court **shall** take judicial notice of any matter specified in Section 452 if a party requests it . . ." (Emphasis added.)

permitting such consideration when ruling on a general demurrer.

In sustaining a general demurrer as in granting a motion for judgment on the pleadings, the trial court in addition to accepting the allegations in the pleadings as true may look into various outside matters under the doctrine of judicial notice (**Alford** v. **Hesse** (1929) 100 Cal.App. 66) including court files (**Kachig** v. **Boothe** (1971) 22 Cal.App.3d 626, 630, cert. denied by S.Ct. February 23, 1972; see also 4 Witkin, Cal. Proc. (2d ed. 1971) Proceedings Without Trial, §§ 161, 162, 176, 177, pp. 2816-2818, and 2828-2830).

Moreover, "[I]t is the rule that where the facts are not in dispute, and the nature of plaintiff's claim is clear, but under the substantive law no liability exists and no amendment would change the result, the sustaining of a demurrer without leave to amend is proper. [Citations.]" (**City of Ceres** v. **City of Modesto** (1969) 274 Cal.App.2d 545, 554.)

The elements necessary to establish legal malpractice sounding in tort are the same as those for any negligence action: (1) duty, (2) breach of that duty, (3) proximate cause, and (4) damage. (See **Neel** v. **Magana, Olney, Levy, Cathcart & Gelfand** (1971) 6 Cal.3d 176; **Chavez** v. **Carter** (1967) 256 Cal.App.2d 577.)

"In any negligence action the existence of a duty of care owed by the defendant to the plaintiff is a question of law for the court. (**Amaya** v. **Home Ice etc. Co.**, 59 Cal.2d 295, 307-308 [29 Cal.Rptr. 33, 379 P.2d 513].) If a duty exists, the complementary degree of care exacted of the defendant — usually that of a reasonable man of ordinary prudence in a like situation — is also declared by law. (Prosser on Torts (3d ed.) pp. 153, 207; Rest. 2d Torts, § 328B.) Breach of duty is usually a fact issue for the jury; if the circumstances permit a reasonable doubt whether the defendant's conduct violates the boundaries of ordinary care, the doubt must be resolved as an issue of fact by the jury rather than of law by the court. (**Warner** v. **Santa Catalina Island Co.**, 44 Cal.2d 310, 318 [282 P.2d

12]; **Mosely** v. **Arden Farms Co.**, 26 Cal.2d 213, 217 [/†# P.2d 372, 158 A.L.R. 782].) Given a breach of duty by the defendant, the decision whether that breach caused the damage (that is, causation in fact) is again within the jury's domain; but where reasonable men will not dispute the absence of causality, the court may take the decision from the jury and tret the question as one of law. (**Basin Oil Co.** v. **Baash-Ross Tool Co.** 125 Cal.App.2d 578, 603 [271 P.2d 122]; see 2 Witkin, Summary of Cal. Law (1960) 1483-1484; Rest. 2d Torts, § 434; Prosser, **Proximate Cause in California,** 38 Cal.L.Rev. 369, 375-383, 420-421.)" (**Ishmael** v. **Millington** (1966) 241 Cal.App.2d 520, 525-526.)

In the case at bench when attorney Watkins undertook to represent Wife in her contested divorce proceedings he assumed a duty of care toward her. "[D]escribed in terms traditionally applicable to the attorney-client relationship, the degree of care exacted by that duty was that of a figurative lawyer of ordinary skill and capacity in the performance of like tasks. (**Lucas** v. **Hamm, supra,** 56 Cal.2d at p. 591.)" (**Ishmael** v. **Millington, supra,** 241 Cal.App.2d at p. 526.)

However, I am aware of no authority, constitutional, statutory, or judicial, which places on an attorney representing a plaintiff in a contested divorce action the **duty** (which is a question of law) of definitively deciding what is or is not community property or listing it in the complaint during the time period attorney Watkins represented Wife in the instant case. The ultimate objective of such litigation is to obtain a court order adjudicating the separate and community character of the marital property and its disposition.

Here, in accordance with accepted practice in the legal profession attorney Watkins incorporated a general protective allegation in the complaint, namely: "[V]arious other items of community property, the exact nature and extent of which is unknown to plaintiff at this time, and plaintiff will therefore ask leave of Court to amend her complaint to conform to proof at the time of Trial."

After he (attorney Watkins) was substituted out as attorney of record on May 13, 1969, he had absolutely no control over the case and was a complete "stranger" to all subsequent proceedings which culminated in the interlocutory judgment of divorce.

The majority opinion reverses the trial court's ruling on the stated ground that "reasonable foreseeability of the second lawyer's [attorney Scott] failure and that foreseeability in this context is a question of fact." Apparently that conclusion is based on its determination that subsection (2) of Restatement Second of Torts section 452 is inapplicable, which determination "turns" on "public policy not previously considered in California."

I respectfully disagree with certain aspects of the public policy argument upon which the majority opinion "turns" and its result.

Certainly no one can quarrel with the proposition that "lawyers are not entitled to special treatment in the form of special relief from the consequences of their negligence that is not afforded other professions" as stated in the majority opinion. However, it (the majority opinion) fails to acknowledge and take into consideration some very basic differences inherent in the nature of litigation, including divorce litigation, in which practicing attorneys are engaged and the inherent nature of the duties and services performed by "other professions" including the medical profession with which it draws an analogy. By the nature of the litigation beast, the duties, mode of functioning, timing, objectives, and relationships of an attorney engaged in litigation vis-a-vis his clients vary markedly from that of a medical practioner to his patients. With the good of the general public foremost in mind, I fail to see the wisdom of rushing the legal profession into the same unseaworthy boat in which the medical profession finds itself about to capsize. The public is saddled with exhorbitant medical charges driven up by numerous expensive medical tests ordered by doctors and by high insurance premiums which doctors pay by reason of actual or threatened medical malpractice suits.

In the instant case the trial court did not afford "special treatment" to attorney Watkins but only afforded "fair and equal treatment" by applying well recognized legal principles and rules of procedure in light of the total circumstances of the case in a common sense and realistic manner. Attorney Watkins, as any defendant in any lawsuit, was entitled to seek a dismissal from the malpractice action as soon as possible, if entitled to one, in order to avoide the expenditure of unnecessary time and expense. He filed a general demurrer to the Wife's first amended complaint requesting the court to take judicial notice of the underlying divorce action file (SWD 25070 hereinbefore described in some detail) pursuant to Evidence Code sections 452 and 453 which was properly sustained.

Moreover, the case of **Fish** v. **Los Angeles Dodgers Baseball Club** (1976) 56 Cal.App.3d 620, referred to in the majority opinion as it bears on concurrent or superseding negligence is clearly factually distinguishable from the case at bench. (see note 5)

Note 5

In **Fish** plaintiffs' son was struck in the head by a foul ball while watching a major league baseball game and was rendered unconscious for about a minute. The boy was treated by the doctor in the emergency first aid station at the stadium. He, after a brief examination, advised plaintiff that he had a bump on the head but appeared to be all right and that he could return to his seat. That night the boy was admitted to the hospital and died four days later of intracerebral hemorrhage. In the wrongful death action brought against the baseball club and the doctor operating its emergency medical facility, plaintiffs' experts testified that the doctor was negligent in treating decedent, and that his failure to immobilize decedent during the period immediately following his injury probably prevented the hemorrhage from spontaneously stopping as the result of the body's normal healing processes. Plaintiffs' experts also testified, however, that decedent could have been saved by emergency surgery after being admitted to the hospital. Such surgery was never performed. Defense counsel urged that the hospital's negligence in no performing the surgery was the legal cause of decedent's death, and not any negligence on behalf of the defendant emergency medical facility doctor. Plaintiffs' request for an instruction that the intervening conduct of the hospital contributing to decedent's death was no defense to defendants' liability for negligence was denied. The jury subsequently returned a verdict in favor of defendants.

The appellate court in reversing held that the claimed negligence of the defendant emergency medical facility doctor and the hospital were concurrent causes of decedent's death, and that it was no defense to plaintiff's claim based on defendant's negligence that the conduct of the hospital was also a substantial factor contributing to decedent's death and the trial court erred in refusing the requested instruction pertaining to concurrent causation.

Any analogy between the action or non-action of a doctor in an emergency situation where the patient has suffered a head injury (as in **Fish**) and an attorney who was involved in the lengthy, protracted contested divorce litigation and only filed a complaint, which protected the community property issues, before he was substituted out of the case would be most strained.

In addition, **Smith** v. **Lewis** (1975) 13 Cal.3d 349 (Justices Clark and McComb dissenting), a legal malpractice suite, is also clearly distinguishable from the case at bench. (see note 6)

Here the superior court file of the underlying divorce action shows: (1) that it was not an uncontested divorce action but a hotly contested one; (2) that attorney Watkins only filed a complaint which protected the community property issues and was substituted out as attorney of record a few days after the pleadings were at issue; and (3) that attorney Scott (except for a few days in which Wife appeared "in pro per") was the attorney of record and represented Wife at the OSC, undertook discovery, and also represented her at the trial which resulted in the interlocutory decree of divorce.

Note 6

In **Smith** plaintiff wife had retained defendant attorney Lewis to handle her **uncontested** divorce action in February 1967. **Attorney Lewis represented her throughout the proceedings.** He filed the complaint and later obtained the interlocutory decree. Plaintiff wife in her malpractice suit against attorney Lewis claimed he failed in the marriage dissolution proceedings to assert her community interest in her husband's federal and state retirement benefits derived from military service in the California National Guard. In affirming a jury verdict in the sum of $100,000 in favor of wife, the California Supreme Court in 1975 stated in respect to the federal benefits that although "substantial uncertainty may have existed in 1967 with regard to the community character of General Smith's **federal** pension" (italics in original) (13 Cal.3d at p. 357) the "federal [military retirement] benefits at least arguably belonged to the community" (p. 360) and should have been pressed.

Some members of the family law bar have construed **Smith** v. **Lewis, supra,** 13 Cal.3d 349, as telling them they were all retroactively guilty of malpractice. (see note 7)

The majority opinion inthe case at bench could be construed as telling them that they must also, retroactively and prospectively, be swamis with soothsaying capability as to the competency of subsequent counsel without a say in the selection of subsequent legal representation. They can be relieved as attorneys of record at any time at the sole discretion of their clients, with or without cause, and have no say whatsoever in the selection of subsequent counsel, as present here.

I would also take judicial notice of the fact "not reasonably subject to dispute" (Evid. Code, § 452, subds. (g) and (h)) that the vast majority of the over 45,000 practicing attorneys in California represent their clients in a competent and non-negligent manner and that negligent conduct is the rare exception as evidenced by the paucity of legal malpractice actions compared to the multitude of legal matters handled.

In summary, we have the following situation: attorney Watkins protected the issue in the complaint he filed before he was substituted out; he had no say in the selection of and was not in privity with the subsequent attorney; he was a complete stranger to and had no control or participation in the OSC and the trial which culminated in the interlocutory decree of divorce.

Note 7

See California Family Law Reprot, Volume I, Number 1, January 3, 1977. COMMENT at page 1010.

By reason of the above, I conclude that attorney Watkins could not reasonably forsee the failure, if any, of the subsequent attorney (attorney Scott) to properly protect the community interest of Wife in Husband's federal military retirement pension; that the alleged negligence of attorney Scott, if any, constituted an independent intervening (superseding) course which insulates attorney Watkins from liability; and that the instant case in one "where reasonable men will not dispute the absence of causality" (**Ishmael** v. **Millington, supra,** 241 Cal.App.2d 520, 526).

I would therefore hold the trial court properly sustained his general demurrer without leave to amend as a matter of law.

Accordingly, by reason of the foregoing I would affirm the judgment (order of dismissal).

HANSON, J.

FILED
CLAY ROBBINS, JR., CLERK
JAN 21, 1977

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss
County of Riverside)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main Street, Santa Ana, California.

On February 2, 1977, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of three sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Clerk of the Superior Court
County of Orange
700 Civic Center Drive West
Santa Ana, California 92701

Clerk of the Court of Appeal
4th Appellate District
303 West Third Street
San Bernardino, Calif. 92401

Attorney General
State of California
3580 Wilshire Blvd., Suite 800
Los Angeles, Calif. 90010

MC KAY & BYRNE
Attorneys at Law
3250 Wilshire Blvd., Suite 203
Los Angeles, Calif. 90010

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED on February 2, 1977 at Santa Ana, California

JACK GALLAGHER